Supreme Court, U.S.
FILED

97 • 266 AUG 4 1997

No. ___ OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

JAMES W. WOODSON,
Petitioner,

v.

SCOTT PAPER COMPANY,
Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

ALAN B. EPSTEIN, ESQUIRE
Attorney for Petitioner
JABLON, EPSTEIN, WOLF & DRUCKER
The Bellevue, Ninth Floor
Broad Street at Walnut
Philadelphia, PA 19102
Telephone: (215) 790-0300

QUESTION PRESENTED

Rarely does a single case provide the opportunity to resolve two important legal issues that are the subject of dramatically divergent views of several Courts of Appeals. The questions presented here are:

1. Does the "motivating factor" analysis of Section 107(a) of the Civil Rights Act of 1991 apply to retaliatory discharge cases?

2. Should the stringent criminal harmless error analysis of *Kotteakos v. U.S.*, 328 U.S. 750 (1946) be applied in civil cases?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED .	i
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. Procedural History	4
B. Statement of the Applicable Facts	6
REASONS FOR ALLOWANCE OF THE WRIT	9
I. The Courts of Appeals Are Split on the Issue of Whether the "Motivating Factor" Analysis of Section 107(a) of the Civil Rights Act of 1991 Applies to Retaliatory Discharge Cases and This Court's Intervention is Necessary to Assure Uniformity.	9

		Page
II.	The Criminal Law Harmless Error Standard Set Forth in *Kotteakos* Should Not Be Applied in Civil Cases and This Court Should Resolve the Longstanding Division of Authority in our Circuit Courts of Appeal.	14
CONCLUSION		20

TABLE OF AUTHORITIES

	Page
Aetna Cas. & Sur. Co. v. Gosdin, 803 F.2d 1153 (11th Cir. 1986)	18
Beinlich v. Curry Development, Inc., 54 F.3d 772 (4th Cir. 1995)	12
Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927 (5th Cir. 1976)	18
Doe v. Kohn, Nast & Graf, 862 F.Supp. 1310 (E.D. Pa. 1994)	12
Griffiths v. CIGNA Corp., 988 F.2d 457 (3d Cir. 1993)	11
Haddad v. Lockheed California Corp., 720 F.2d 1454 (9th Cir. 1983)	18
Hall v. City of Brawley, 887 F.Supp. 1333 (S.D. Cal. 1995)	12
Heywood v. Samaritan Health System, 902 F.Supp. 1076 (D. Ariz. 1995)	11,12
Jalil v. Avdel Corp., 873 F.2d 701 (3d Cir. 1989)	11
Kenworthy v. Conoco, Inc., 979 F.2d 1462 (10th Cir. 1992)	11

	Page
Kotteakos v. U.S., 328 U.S. 750 (1946)	i,1,18, 19
Lewis v. American Foreign Serv. Ass'n., 846 F.Supp. 77 (D.D.C. 1993)	12
McIlroy v. Dittmer, 732 F.2d 98 (8th Cir. 1984)	18
McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985)	18
Paape v. Wall Data, Inc., 934 F.Supp. 969 (N.D. Ill. 1996)	12
Riess v. Dalton, 845 F.Supp. 742 (S.D. Cal. 1993)	12
Smith v. Chesapeake & Ohio, 778 F.2d 384 (7th Cir. 1985)	18
Tanca v. Nordberg, 98 F.3d 680 (1st Cir. 1996)	12
United States v. Lane, 474 U.S. 438 (1986)	17
U.S. Industries, Inc. v. Touche Ross & Co., 854 F.2d 1223 (10th Cir. 1988)	18
Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881 (7th Cir. 1996)	12

	Page
Woodson v. Scott Paper Co., 898 F.Supp. 298 (E.D. Pa. 1995)	1,5,8,10, 10,14,16
Woodson v. Scott Paper Co., 109 F.3d 913 (3d Cir. 1997)	1,16,17
Statutes	
28 U.S.C. § 1291	2
28 U.S.C. § 1331	2
28 U.S.C. § 2111	4,5,17
42 U.S.C. § 1981	4
42 U.S.C. § 2000e	4
42 U.S.C. § 2000e-2	10,11
42 U.S.C. § 2000e-2(m)	2,5,10, 11
42 U.S.C. § 2000e-3	11
42 U.S.C. § 2000e-3(a)	11
Federal Rule of Civil Procedure 61	3, 17
Federal Rule of Evidence 103(a)	3, 17

Page

Other Authority

2 Lex K. Larsen. *Employment Discrimination*, § 35.04[1] 11

EEOC Enforcement Guidance: Compensatory and Punitive Damages Under the 1991 Civil Rights Act, Notice No. N 915.002 (July 7, 1992), FEP Manual (BNA) 405:6915 11

H.R. Rep. No. 40(II), 102 Cong. 1st Sess. 4 (1991) 12

PETITION FOR WRIT OF CERTIORARI

James W. Woodson ("Woodson") respectfully prays that a writ of certiorari issue from this Honorable Court to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this action on April 3, 1997, and to resolve the division among the Circuit Courts of Appeals as to two separate but equally important issues, to wit: whether the "motivating factor" analysis of Section 107(a) of the Civil Rights Act of 1991 applies to retaliatory discharge cases; and whether the stringent harmless error analysis of *Kotteakos v. U.S.* should be applied in civil cases.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 109 F.3d 913 (3d Cir. 1997). A copy of this decision is attached to this Petition as Appendix A ("App. A"). Attached as Appendix B ("App. B") is a copy of the Order filed by the Court of Appeals on May 6, 1997, denying petitioner's Petition for Rehearing and Suggestion for Rehearing *en banc*. The August 4, 1995 Opinion and Order of the District Court for the Eastern District of Pennsylvania is reported at 898 F.Supp. 298 (E.D. Pa. 1995). A copy is attached to this Petition as Appendix C ("App. C").

JURISDICTION

The District Court, which had jurisdiction over the subject matter of this retaliatory discharge case pursuant to the provisions of 28 U.S.C. § 1331, entered judgment (for plaintiff, James W. Woodson) in the amount of $1,496,698.70 on the verdict of a jury. An appeal was taken by defendant employer, Scott Paper Company, to the United States Court of Appeals for the Third Circuit, pursuant to the jurisdictional provisions of 28 U.S.C. § 1291. The Court of Appeals reversed the District Court's grant of judgment by Order and Opinion of April 3, 1997 and remanded the case for a new trial. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by Order of May 6, 1997. Pursuant to Supreme Court Rule 13.3, this Petition was filed within 90 days of the denial of rehearing.

STATUTORY PROVISIONS INVOLVED

Section 107(a) of the Civil Rights Act of 1991 provides:

> [A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m).

Rule 103(a) of the Federal Rules of Evidence provides:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Rule 61 of the Federal Rules of Civil Procedure provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

28 U.S.C. 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

A. Procedural History

On November 11, 1993, appellee James W. Woodson ["Woodson"], an African-American male chemical engineer, instituted the present action against his former employer, Scott Paper Company ["Scott Paper"] alleging that he was a victim of unlawful racial discrimination and retaliation, all in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, §§ 102, 103 and 107, 105 Stat. 1071, et seq., 42 U.S.C. §§ 2000e, et seq. [hereinafter "Title VII"], the Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991, § 101, 105 Stat. 1071, et seq., 42 U.S.C. § 1981, and the statutory and common law of the Commonwealth of Pennsylvania.

On February 7, 1995, a trial was held before the Honorable Edmund V. Ludwig of the United States District Court for the Eastern District of Pennsylvania and a jury. Before the case was submitted to the jury, Scott Paper moved for Judgment as a Matter of Law pursuant to Rule 50 of the Federal Rules of Civil Procedure. The district court properly denied that motion and submitted the case to the jury on

February 15, 1995. The jury returned a verdict for Woodson on his retaliation claim and awarded him the stipulated amount of $150,000 in past earnings, $397,845 in future earnings, $10,000 for emotional distress, and $1,000,000 in punitive damages.

Scott Paper filed a post-verdict Renewed Motion for Judgment as a Matter of Law, together with a Motion to Alter the Judgment or, in the alternative, for a New Trial. The district court denied the motions in part and granted them in part, holding, in pertinent part, that (1) the evidence was sufficient to support a finding of causal relationship between Woodson's discrimination allegations and his subsequent retaliatory discharge; (2) the trial court's instruction to the jury regarding whether race was a "motivating factor" in the employee's discharge was not erroneous and, if erroneous, was harmless; (3) Scott Paper's failure to respond to racist graffiti on the workplace restroom walls could be regarded as direct evidence of Scott Paper's unlawful animus [898 F.Supp. 298 (E.D. Pa. 1995)]. Judgment was entered by the Court in the total amount of $1,496,698.70.

A timely appeal was taken by Scott Paper to the United States Court of Appeals for the Third Circuit, which held on April 3, 1997, that Woodson had established a viable cause of action for retaliatory discharge, but remanded the case for a new trial on the basis that the motivating factor analysis of Section 107(a) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), used by the trial court to instruct the jury on Woodson's burden of proof did not apply to retaliatory discharge cases. The Court of Appeals also held that the trial court further committed prejudicial error in instructing the jury that the lack of response of Scott Paper to racist graffiti at the workplace (reflective of a retaliatory reaction to Woodson's

filing of charges against Scott Paper) could constitute direct evidence of the employer's discriminatory animus.

Woodson's Petition for Rehearing and his Suggestion for Rehearing *En Banc* were denied on May 6, 1997.

B. Statement of the Applicable Facts

James W. Woodson, an African-American male, graduated from Philadelphia College of Textile in 1967 with a Bachelor of Science in Chemistry with a minor in Textile Engineering. Following his graduation from college, Woodson served as an engineer for several manufacturers and on December 20, 1970, he was hired as a Chemical Material Specialist at Scott's headquarters in Philadelphia, Pennsylvania. From 1970 through 1988, Woodson was recognized by his superiors at Scott Paper as a talented and hardworking employee and was rewarded with promotions, merit wage increases, bonuses and awards.

Beginning in 1988, Woodson applied for numerous Product System Leader and equivalent positions in Chester, Pennsylvania and in other locations. Woodson was never considered for any of these positions and he complained to his supervisors about Scott Paper's refusal to promote him. By late 1989, Woodson became so frustrated by the failure of Scott to promote him that he decided to bring his complaints before the appropriate state and federal agencies. In November, 1989 and again in February, 1990, Woodson filed charges of discrimination against Scott Paper with the Equal Employment Opportunity Commission and the Pennsylvania Human Relations Commission, alleging that Scott Paper refused to appoint him to the manufacturing position of Product System

Leader and other open manufacturing positions because of his race. At trial, the Chester plant manager testified that he was aware of the charges when they were filed and was disappointed that Woodson had filed a complaint.

In a 1989 evaluation, which was done after Woodson complained of discrimination, the company suggested that he had a psychological problem that required evaluation and treatment. Woodson's supervisor (who also was aware of the charges of discrimination), suggested that Woodson work with an outside consultant "to evaluate and improve perception by superiors . . ." Scott Paper's Director of Human Resources for Manufacturing and Logistics also suggested that Woodson consult with a behavioral psychologist, one located in North Carolina. Woodson testified at trial that the only change in his behavior from past years to the time these suggestions were made was that he had filed charges of discrimination against Scott.

In October, 1990, only after he had filed his charges of discrimination, Woodson was finally awarded one of three open engineering positions. In apparent support of Woodson's consistently proffered theory that he was being set up to fail, the Chester plant manager admitted at trial that, of the three systems, the one awarded to Woodson was not only the smallest in terms of size and output, but was a system that had been plagued with performance and safety problems. In addition, the salary rating points for Woodson's new position were lower than for any equal position in the plant.[1]

---

[1] The district court specifically found that "[t]his assignment was consistent with his [Woodson's] theory that he was being set up for failure -- and that this was the way the company had decided to deal

After his promotion, Woodson was subject to additional retaliatory treatment: he was denied adequate staffing and management support by the plant manager, and (shortly after receiving the promotion) he was told by the Human Resources Director to drop his administrative complaints in a manner that caused Woodson to be greatly upset.

Several other events also contributed to Woodson's appropriate perception that Scott Paper management possessed retaliatory motive: following his filing of charges, and while he was the scheduled weekend engineering executive on duty, graffiti was spray painted on the walls in the plant bathroom near his work station stating "NIGGER, I'M GOING TO GET YOU," "NIGGERS ARE TAKING OUR JOBS," and "NIGGERS WHO TALK ARE NIGGERS WHO HANG."[2] Scott Paper took no reasonably adequate action to investigate the source of this graffiti or to respond to the implicit threat of retaliation contained in the message. The evidence at trial also demonstrated that Woodson continued to seek and was denied promotions even after he received his initial promotional position, but Woodson testified that he felt "blocked".

Finally, on January 27, 1992, Woodson was informed that he was being terminated under a "Cost Reduction Program" and that his position was being "recombined" with another of the engineering positions. Woodson was the only engineer at

---

with his discrimination charges." 898 F.Supp. at 303.

[2] At that time, Woodson was the only new black management employee, and certainly the only black management employee who had "talked" (through the vehicle of a discrimination charge) against the company.

the Chester Plant who was affected by the Cost Reduction Program, and only one of two terminated in the entire country.[3]

REASONS FOR ALLOWANCE OF THE WRIT

I. THE COURTS OF APPEAL ARE SPLIT ON THE ISSUE OF WHETHER THE "MOTIVATING FACTOR" ANALYSIS OF SECTION 107(a) OF THE CIVIL RIGHTS ACT OF 1991 APPLIES TO RETALIATORY DISCHARGE CASES AND THIS COURT'S INTERVENTION IS NECESSARY TO ASSURE UNIFORMITY.

The basis of the Circuit Court's remand for a new trial is the trial court's jury instructions relating to Woodson's burden of proof, the pertinent parts of which are as follows:

> . . . it is unlawful for an employer to discriminate against an employee because of his race or because the employee has filed an administrative charge of discrimination against the employer which is permitted by those acts.
>
> If such discrimination, either because of race or in retaliation for the filing of a charge, results in an employment decision such as the employee's termination, it is an unlawful

---

[3] Before his discharge, there were 23 engineers in equivalent positions nationwide. The other product systems engineer who was terminated was also black, but his position was not eliminated. Instead, it was given to another white member of the manufacturing staff who allegedly ranked higher.

employment practice.

* * *

He need not prove that his race or the alleged retaliation was the only factor or reason or the most important factor or reason in the employer's decision. But, he must prove that either race or retaliation was a motivating factor or reason. In other words, that it played a role in Scott's decision to terminate him.

* * *

In any event, in such a case, the ultimate question, the final question for the jury to decide is whether, based on all the evidence in the case, plaintiff has proven by a preponderance of the evidence that he was discharged either because of his race or in retaliation for filing the charges. In other words, that race or retaliation was a motivating factor, a factor that played a role in the employment decision to terminate him.

Woodson, 898 F.Supp. at 305.

The panel of the Third Circuit held that the standard of proof as stated in Section 107(a) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m),[4] should not be applied to

---

[4] In General. - Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) . . . is further amended by adding at the end the following new subsection:

"(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating

retaliation claims under Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), in large measure because the applicable section does not specifically mention retaliation as one of the prohibited factors.[5]

The contrary interpretation favoring applicability to retaliatory discharge cases has been supported in numerous cases by legal commentators and by the EEOC. *See Heywood v. Samaritan Health System*, 902 F.Supp. 1076 (D. Ariz. 1995); 2 Lex K. Larsen. *Employment Discrimination*, § 35.04[1]; EEOC Enforcement Guidance: Compensatory and Punitive Damages Under the 1991 Civil Rights Act, Notice No. N 915.002 at p. 12, n. 14 (July 7, 1992), FEP Manual (BNA) 405:6915 at 405:6921, n. 14. Moreover, the reference in

---

factor for any employment practice, even though other factors also motivated this practice."

[5] Certainly, prior to the passage of that section, the courts consistently applied the standard of proof under 42 U.S.C. § 2000e-2 to retaliation cases under 42 U.S.C. § 2000e-3. Jalil v. Avdel Corp., 873 F.2d 701, at 706-707 (3d Cir. 1989); Griffiths v. CIGNA Corp., 988 F.2d 457 (3d Cir. 1993); Kenworthy v. Conoco, Inc., 979 F.2d 1462 (10th Cir. 1992).

Contrary to the view of the Third Circuit, the language of Section 107(a) mandating the use of the "motivating factor" language, while not explicitly listing retaliation, does require use of the test to establish "an unlawful employment practice" [42 U.S.C. § 2000e-2(m)] which would include the retaliatory discharge of Woodson applicable herein. Additionally, the anti-retaliation provision of Title VII, upon which, in part, Woodson's claims were based, appears under the specific heading "other unlawful practices" [42 U.S.C. § 2000e-3].

Section 107 to "any employment practice" can only logically be interpreted to include retaliation as an "employment practice," and nowhere in the CRA is there any expression of Congress's intent to exclude retaliation from the purview of Section 107. *See also Hall v. City of Brawley*, 887 F.Supp. 1333 (S.D. Cal. 1995); *Doe v. Kohn, Nast & Graf*, 862 F.Supp. 1310 (E.D. Pa. 1994); *Lewis v. American Foreign Service Ass'n.*, 846 F.Supp. 71 (D.D.C. 1993); *Paape v. Wall Data, Inc.*, 934 F.Supp. 969 (N.D. Ill. 1996).

More importantly, the constrained view of the Third Circuit which led to reversal and remand has also been rejected by the Courts of Appeal for the Fourth Circuit [*Beinlich v. Curry Development, Inc.*, 54 F.3d 772 (4th Cir. 1995)] and the Seventh Circuit [*Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 893 (7th Cir. 1996)]. In *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996), the First Circuit, while recognizing that other courts (including the Fourth Circuit in *Beinlich*) had reached an opposite result, held that the motivating factor analysis was not applicable in retaliation cases. *See also Riess v. Dalton*, 845 F.Supp. 742 (S.D. Cal. 1993). It is also clear (despite the Circuit Court's suggestion to the contrary) that Congress favored the judicial "borrowing" concept proffered by Woodson and the district court herein. *See* H.R. Rep. No. 40(II), 102 Cong. 1st Sess. 4 (1991). *See also Heywood*, 902 F.Supp. at 1081 and 1081 n. 1.

It is respectfully suggested that the decisions of the First and Third Circuits would mandate an untenable result. In the many instances where both issues of class-based discrimination and retaliation are brought together, the trial court would be forced to instruct the jury confusingly using two different standards. As reflected by the opinions of the Fourth and

Seventh Circuits, Congress was attempting to clarify, not confuse, when it passed Section 107, and therefore, the decision of the Third Circuit should now be examined in light of the clear split in the decisional law of the circuits.[6]

---

[6] Rejecting the holding of the district court that Scott Paper waived the argument that Section 107(a) does not apply, the panel further conjured the bogeyman of the "miscarriage of justice" exception to the explicit waiver rule to *sua sponte* support its remand order [Opinion at p. 35 n. 21]. This action completely ignores Scott Paper's clear admission that it was waiving this argument on appeal:

> The District Court determined that Scott had waived its first argument, noting that Scott had not raised the argument that Section 107(a) did not include the term "retaliation" at or before trial. 898 F.Supp. at 305. Scott does not contest the District Court's finding on its first argument on this appeal, and does not rely upon this first argument to justify a new trial.

Reply Brief of Scott Paper in the court below at 12 (footnote omitted).

Certainly, a "miscarriage of justice" or "exceptional circumstance" cannot exist if the complaining party knowingly waives the right to base its objection on any discrete point of law and, as supported by the court below, Scott Paper's waiver should have been honored.

II. THE CRIMINAL LAW HARMLESS ERROR STANDARD SET FORTH IN *KOTTEAKOS* SHOULD NOT BE APPLIED IN CIVIL CASES AND THIS COURT SHOULD RESOLVE THE LONGSTANDING DIVISION OF AUTHORITY IN OUR CIRCUIT COURTS OF APPEAL.

At trial, the district court charged the jury that the employer's acquiescence in racial graffiti spray painted on the wall of the men's bathroom after plaintiff filed his EEOC charge, stating, in part, "NIGGERS WHO TELL ARE NIGGERS WHO HANG," could be (if supported by the evidence) direct evidence of Scott Paper's discriminatory animus:[7]

> There was evidence of race-based graffiti in a bathroom at the Chester plant. An employer that permits such graffiti to exist may be held responsible for the racial bias conveyed by it if it condones the graffiti or acquiesces in it.
>
> All of the facts and circumstances, including the employer's reaction, the steps, if any, taken by the employer to counteract the graffiti and what was reasonably required given the nature of the racial provocation, should be considered in deciding whether the employer's alleged lack of appropriate response bears on its racial attitude. In other words, it is direct evidence of the employer's intent to discriminate.

898 F.Supp. at 308.

---

[7] Woodson was the only management employee at the plant who had filed racial discrimination charges and the only African American management employee at the site.

Scott Paper contested at trial and on appeal the use of the words "direct evidence" as it related to the district court's instruction, a position which was rejected by the trial court in a well-reasoned discussion of the instruction and the distinction between direct and circumstantial evidence:

> Moreover, the distinction between direct and circumstantial evidence is often "subtle and difficult." Price Waterhouse v. Hopkins, 490 U.S. at 291, 109 S.Ct. at 1812 (Kennedy, J., dissenting). In a general instruction on direct and circumstantial evidence, the jury was told that it could consider both kinds of evidence in reaching its verdict, Feb. 15, 1995, charge, N.T. 10-11.
>
> The term "direct evidence" has both an evidentiary and an employment law sense. Id. Failure to respond appropriately or an acquiescence can be equated with approval, acceptance, or actual expression. And silence, where there is a duty to respond, has been said "to speak with the voice of thunder." As a matter of employment law, had the company's managers said the words that appear in the graffiti, that would have constituted direct evidence of racial animus. See Armbruster v. Unisys Corp., 32 F.3d 768, 778 (3d Cir. 1994)(direct evidence is evidence directly reflecting a discriminatory or retaliatory animus on the part of a person involved in the decisionmaking process). In this way a condonation or acquiescence in the graffiti can

> be regarded as direct evidence of company animus--in contrast with evidence of pretext, which is circumstantial. It was for this reason that the instruction, using the term "direct evidence," was given. The jury had previously been instructed that the evidentiary effect of the pretext syllogism was "circumstantial." Feb. 15, 1995, charge, N.T. 6.

898 F.Supp. at 309.

The Third Circuit, while initially stating that it did "not necessarily agree with Scott's argument," raised unsupported concerns about the effect of the charge on the jury.[8] The magnification of the "possible" effect of a single word, in an instruction that took 45 minutes to deliver to the jury, is totally contradicted by the improperly speculative conclusion that the instruction "might have worked significant prejudice against Scott." *Woodson*, 109 F.3d at 930.

In remanding this matter for a new trial, the Third Circuit rejected the district court's conclusion that neither the "motivating factor" nor "direct evidence" portions of the trial court's charge would have prejudicially affected the jury [898 F.Supp. at 308, 309]. It relied instead upon the standard generally applied in criminal cases to conclude that "we cannot say that there is a high probability that the error did not affect

---

[8] The panel decision used speculative language such as "could have" and "might have" throughout its discussion to demonstrate the impact on the factfinder without any concomitant assignment of a specific basis in the record for these speculative fears. *Woodson*, 109 F.3d at 930.

the outcome of the case." *Woodson*, 109 F.3d at 931.

Federal Rule of Evidence 103(a) states that an evidentiary ruling may not be reversible error "unless a substantial right of a party is affected." *See also* Federal Rule of Civil Procedure 61 ("no error ... is ground for granting a new trial or for setting aside a verdict ... unless refusal to take such action appears to the court inconsistent with substantial justice"); 28 U.S.C. § 2111 (appellate court should give judgment "without regard to errors or defects which do not affect the substantial rights of the parties").

Once an appellate court has reached a decision that the judge in the court below has erred, the court must then decide whether that error was harmless, i.e., did it make a difference to the outcome of the case? Such decisions in regard to harmless error are vitally important in the American system of jurisprudence. *United States v. Lane*, 474 U.S. 438, 478 (1986)(Stevens, J. concurring and dissenting). It is without reservation one of the most significant tasks an appellate court must undertake.

A court's power in this regard derives from the above-cited three sources, all of which hinge on the court's determination of "substantial justice" and the "substantial rights" of the parties. Fed.R.Civ.P. 61, Fed.R.Evid. 103(a), and 28 U.S.C. § 2111.

In 1946, this Court first carefully reviewed the controlling statute (now 28 U.S.C. § 2111) and the restatement in the Federal Rules of Procedure (civil and criminal) and resolved that in a complex criminal conspiracy trial where it was "highly probable that the error had substantial and injurious

effect or influence in determining the jury's verdict," the convictions had to be reversed. *Kotteakos v. U.S.*, 328 U.S. 750, 776 (1946). The Court did not, however, define a standard to be used in all cases, both criminal and civil:

> The statute in terms makes no distinction between civil and criminal causes. But this does not mean that the same criteria shall always be applied regardless of this difference
>
> * * *
>
> It did not require the same judgment in such a case as in one involving only some question of civil liability.

Id. at 762-763.

Since that time, each Court of Appeals examining the issue of non-Constitutional harmless error in civil cases has set its own test. The Courts of the Third Circuit [*McQueeny v. Wilmington Trust Co.*, 779 F.2d 916, 917 (3d Cir. 1985)]; Fifth Circuit [*Conway v. Chemical Leaman Tank Lines, Inc.*, 525 F.2d 927, 929 (5th Cir. 1976)]; and Eleventh Circuit [*Aetna Cas. & Sur. Co. V. Gosdin*, 803 F.2d 1153, 1159 (11th Cir. 1986)] have chosen to adopt a criminal standard similar to that in *Kotteakos* for application in civil and criminal cases, while the Seventh Circuit (*Smith v. Chesapeake & Ohio*, 778 F.2d 384, 389 (7th Cir. 1985)); Eighth Circuit (*McIlroy v. Dittner*, 732 F.2d 98, 105 (8th Cir. 1984)); Ninth Circuit (*Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983)) and Tenth Circuit (*U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1252-53 (10th Cir. 1988)) have formulated "more probable than not" standards which parallel the preponderance of the evidence test in civil cases.

It is respectfully suggested that the adherence to a criminal standard of harmless error in civil cases is improper and contrary to the suggestions made in *Kotteakos*. The present matter presents an excellent opportunity to review and resolve this important issue and resolve the clearly divided opinions of the Circuit Courts cited above.

CONCLUSION

It is respectfully suggested that this Court should use its supervisory powers to eliminate the clear split of authority on both important issues presented by the present Petition and accordingly, petitioner requests that the Court grant *certiorari* to effect that end.

Respectfully submitted,

ALAN B. EPSTEIN
Attorney for Petitioner
JABLON, EPSTEIN, WOLF & DRUCKER
The Bellevue, Ninth Floor
Broad Street at Walnut
Philadelphia, PA 19102
(215) 790-0300

Dated: August 4, 1997

Copr. © West 1997 No Claim to Orig. U.S. Govt. Works

109 F.3d 913
65 USLW 2775, 73 Fair Empl.Prac.Cas. (BNA) 1237
(Cite as: 109 F.3d 913)

James W. WOODSON, Appellee,

v.

SCOTT PAPER CO., Appellant.

No. 95-1758.

United States Court of Appeals,
Third Circuit.

Argued May 15, 1996.

Decided April 3, 1997.
Sur Petition for Panel Rehearing
with Suggestion for Rehearing In Banc
May 6, 1997.

African-American male employee brought action against his former employer for discrimination and retaliation in violation of Title VII and the Pennsylvania Human Relations Act (PHRA). After jury returned verdict for employee, employer moved for judgment as matter of law or for new trial. The United States District Court for the Eastern District of Pennsylvania, Edmund V. Ludwig, J., 898 F.Supp. 298, granted motion in part and denied it in part, and employer appealed. The Court of Appeals, Becker, Circuit Judge, held that: (1) employee established causal link between his administrative

complaints of discrimination and his discharge two years later, as required for prima facie case of retaliation; (2) he failed to initiate administrative proceedings for recovery under PHRA; (3) he would not be entitled to proceed under PHRA even if application of equitable principles applied; (4) jury instruction on racist graffiti in workplace as direct evidence of employer's retaliatory intent was prejudicial error; (5) jury was improperly instructed that adequacy of employer's response to incident of racist graffiti at workplace was direct, rather than circumstantial, evidence of employer's discriminatory animus; and (6) district court abused its discretion in failing to instruct jury that improper motive must have had determinative effect on employer's decision to fire employee.

Affirmed in part, and reversed and remanded in part.

[WEST Keynotes Omitted].

Steven R. Wall (Argued), Julie A. Uebler, Morgan, Lewis & Bockius, Philadelphia, PA, for Appellant Scott Paper Company.

Alan B. Epstein (Argued), Jablon, Epstein, Wolf & Drucker, Philadelphia, PA, for Appellee James W. Woodson.

Before: BECKER, NYGAARD, and LEWIS, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

James W. Woodson, an African-American male, brought suit against Scott Paper Company claiming that he was a victim of unlawful racial discrimination and retaliation in violation of Title

VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Pennsylvania Human Relations Act, 43 Pa.S. § 951 et seq. The jury found for Scott on the discrimination claims, but for Woodson on the retaliation claims, and made a large damages award. This appeal by Scott from the denial of its posttrial motions presents three issues.

First, Scott contends that the evidence was insufficient as a matter of law to establish that Woodson was terminated in retaliation for filing discrimination charges with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC"). Some two years passed between the complaints and his termination. According to Scott, the jury could not have reasonably found a "causal link" between the complaints and Woodson's discharge because the evidence fails to support a pattern of antagonistic behavior by Scott that links the complaints and the termination, which we have required in cases in which the two events are temporally remote. Although the question is close and no piece of evidence alone is sufficient to support a causal link finding, we will reject Scott's contention that judgment as a matter of law was improperly denied and affirm the denial of the Rule 50 motion in this respect because the evidence, when considered in its entirety, is sufficient to establish a causal link.

Scott's second contention is that, because no verified complaint was filed with the PHRC, judgment should be entered in its favor on Woodson's retaliation claim under the Pennsylvania Human Relations Act ("PHRA") and, concomitantly, that Woodson's verdict is subject to the $300,000 damages cap of Title VII, 42 U.S.C. § 1981a(b)(3). We agree. The worksharing agreement between the PHRC and the EEOC does not operate to satisfy the PHRA's filing requirement. Moreover,

the district court erred in holding that Woodson was excused from the filing requirement under the doctrine of "equitable filing," even if we were to predict that the Pennsylvania Supreme Court would adopt such a doctrine. Hence we will reverse the district court's denial of Scott's Rule 50 motion in this respect and direct the district court to enter judgment in Scott's favor on Woodson's PHRA retaliation claim.

Finally, Scott appeals from the denial of its motion for a new trial under Fed.R.Civ.P. 59, and makes two separate claims of error in the jury instructions. First, it contends that the district court incorrectly instructed the jury that racist graffiti that appeared in a bathroom at Scott's Chester plant was "direct evidence" of Scott's unlawful motive. We conclude that the district court erred in charging the jury as such; the charge was misleading on several levels, and the graffiti incident can, at most, constitute circumstantial evidence of Scott's retaliatory motive. Second, Scott contends that the district court erred in charging the jury that retaliation need only be a "motivating factor" in Woodson's discharge in order to find in Woodson's favor, and that the jury should have been instructed that retaliation must have had a "determinative effect" on the decision to fire Woodson. Because we hold that the "motivating factor" standard of § 107 of the Civil Rights Act of 1991 does not apply to retaliation claims, we necessarily conclude that the determinative effect standard, established in Miller v. CIGNA Corp., 47 F.3d 586, 595 (3d Cir.1995) (en banc), governs this case. *917 Moreover, the jury charge errors were not harmless. For these reasons, we will affirm in part and reverse in part, and remand for a new trial on Woodson's retaliation claim.

I. Facts and Procedural History

Woodson joined Scott in 1970 as a Chemical Material Specialist at the company's Philadelphia, Pennsylvania headquarters. Within six months, he was promoted to the position of Wet End Specialist. In 1973, Woodson received his second promotion (to Process Engineer) and was transferred to Scott's plant in Detroit. He remained in Detroit until 1978, having advanced to the position of Technical Director. After a brief return to Pennsylvania (this time to Scott's Chester plant), Woodson was promoted to Finishing Superintendent and relocated to Michigan.

In 1981, Woodson's wife unexpectedly died in surgery leaving him to raise a young son and nephew. He requested a transfer to the Philadelphia area in order to be closer to his family. In 1983, Scott found him a position in Chester, but it required a demotion to Paper Mill Technical Manager for the plant. Woodson accepted the position.

Woodson was successful at the Chester plant. In his 1986 performance evaluation, he received a ranking of "8" out of a possible 10 points from his supervisor, who praised his strengths as both a team player and a leader. Woodson was promoted to Technology Manager in 1987 and received a performance rating of "highly successful" in that position in 1987, 1988, and 1989. In 1989, he received an award for his involvement in an innovative plant project. He received raises in both 1989 and 1990.

Beginning in 1988, Woodson applied unsuccessfully for numerous product system leader positions. In November 1989, and again in February 1990, frustrated with Scott's failure to promote him, he filed charges of discrimination against Scott with both the EEOC and the PHRC, alleging that Scott had

failed to promote him because of his race.

Scott maintains that Woodson was not promoted to product system leader in 1988 because he performed poorly in an interview for that position. In addition, Scott points out that Woodson's 1988 performance evaluation, prepared at the beginning of 1989, reported that he had "problems communicating with some peers and superiors diminishing his effectiveness. Does more telling than selling thereby creating conflict." Both Woodson and John Zohlman, Scott's Director of Human Resources for Manufacturing and Logistics, testified that, in May or June 1989, before Woodson filed his complaints, Zohlman suggested that Woodson consult with a behavioral psychologist, Dr. Bell, to improve his working relationships. Woodson's 1989 performance evaluation, prepared in 1990 after he had filed his first complaint, recommended that Woodson work with an outside consultant "to evaluate and improve perception by superiors."

In October 1990, Woodson was awarded one of the three open product system leader positions, in the Light Weight Wet Strength--Napkins division. In this capacity, he reported to James Peiffer, the Chester Plant Manager. [FN1] Peiffer testified that Woodson was awarded the napkin line position because "the napkins was a good fit for him," and Woodson testified that he was "probably the only person at Scott Paper who could turn napkins around." Of the three divisions with open positions, the napkin line division was the smallest and worst performing.

FN1. Peiffer reported to Thomas Czepiel and William Wadsworth, who participated in the "forced ranking" that led to Woodson's dismissal.

Woodson testified that, after receiving this promotion, Zohlman called to congratulate him. During the course of that conversation, Zohlman suggested that Woodson drop his administrative complaints: "[Zohlman] basically, in passing comment, suggested that okay, now that I was a product system leader, I ought to focus my attention in that direction toward--as opposed to the EEO suits and perhaps I should drop the suits."

Woodson claims that, as product system leader, he repeatedly requested more workers and more management support, but that these requests were denied until October *918 1991, just months before his discharge. Woodson also continued to seek further promotions, but testified that he felt blocked.

In June or July 1991, during Woodson's tenure as product system leader, graffiti was spray-painted on the wall of a men's bathroom in the Chester plant. That graffiti stated--"Nigger, I'm going to get you," "Niggers are taking our jobs," and "Niggers who talk are Niggers who hang." At the time, Woodson was the only new black management employee, and the only one who had "talked"--i.e., filed a claim of discrimination. Scott immediately hired a private investigator to explore the incident, and sent out a letter to employees condemning the graffiti. Scott also formed a task force, which hired an outside consultant and prepared a survey of employees to explore the issues raised by the graffiti. The parties, however, dispute the adequacy of Scott's response: Diversity training was not implemented until after Woodson left Scott's employ, and Woodson testified that to his knowledge Scott took no action in response to the graffiti, other than the letter to employees.

In the fall of 1991, Scott initiated a reorganization and cost

reduction program. Pursuant to the plan, Scott implemented a "forced ranking" of all employees. On November 19, 1991, Thomas Czepiel (Vice President for Manufacturing Operations), William Wadsworth (Vice President, Asset Optimization), and Edward Goldberg (Vice President of Manufacturing Development) met to evaluate twenty-seven managers--both product system leaders and other managers with similar duties. The ranking procedures were designed by Czepiel, Wadsworth, and Zohlman (though Zohlman took no part in the actual evaluation). After the evaluations, Woodson was ranked twenty-fifth even though his annual evaluations were better than or comparable to those of a number of managers ranked above him. The bottom five individuals were selected for termination, and on January 27, 1992, Woodson was informed that he had lost his job.

Wadsworth and Goldberg admitted that they had little firsthand knowledge about Woodson's performance and did not review his personnel file in making their evaluations. Both Wadsworth and Czepiel testified that they were aware at the time of the ranking that Woodson had filed discrimination charges. Czepiel described in an affidavit the decision reached by the group:

Our decision that Mr. Woodson's job skills were less than satisfactory was based on our agreement that Mr. Woodson did not understand and had not adopted the philosophy of the AO organization because he refused to disassociate himself from a hierarchical individualistic management strategy, thus remaining an ineffectual team leader. As a result Mr. Woodson had in our view isolated himself from the members of his product system team, stifled participation and coordination between and among those individuals and created a barrier to the development of the AO concept at the Chester plant. In fact, Mr. Woodson was in my view borderline insubordinate in his rejection of the

organization and cultural changes that Scott was trying to implement as part of the AO concept. Messrs. Wadsworth, Goldberg and I were also aware of the disappointing performance of Mr. Woodson's product system since he assumed leadership of that system in October of 1990. (emphasis added)

As Czepiel described it at trial, the "AO concept" was an attempt at the plant to move away from hierarchical forms of organization to a system in which "people took greater accountability and initiative in doing their work."

The memorandum that outlined the downsizing process stated that "[i]n developing these ratings, consideration should be given to 1990 and anticipated 1991 performance ratings. Major discrepancies between job skill ratings and these performance ratings will need to be explained." The discrepancy between Woodson's successful prior record of achievement and his poor ranking was not raised in the Corporate Review Committee--a group charged with looking at the results of the forced ranking and overruling any incongruous termination decisions--even though Zohlman testified that the memorandum meant that any discrepancies needed to be explained to the Corporate Review Committee.

*919 According to Scott, 259 employees were terminated in the reorganization through this procedure. Woodson, in response, claims that he and the only other African-American product system leader were the only two product system leaders terminated.

In November 1993, Woodson instituted the present action against Scott in the District Court for the Eastern District of Pennsylvania, alleging that he was a victim of unlawful racial

discrimination and retaliation in violation of Title VII and the PHRA. The case came up on trial in February 1995. Before the case was submitted to the jury, Scott moved for judgment as a matter of law, Fed.R.Civ.P. 50(a), on two grounds: (1) Woodson's PHRA claim failed as a matter of law because, as he had admitted, no verified complaint was ever filed with the PHRC; and (2) insufficient record evidence existed from which a jury could conclude that Woodson was terminated in retaliation for filing discrimination charges two years before his termination.

The district court denied Scott's motion and submitted Woodson's case to the jury. The jury returned a verdict in Woodson's favor on the retaliation claims under Title VII and the PHRA and awarded him the stipulated amount of $150,000 in past earnings, $397,845 in future earnings, $10,000 for emotional distress, and $1,000,000 in punitive damages. The jury found for Scott on the discrimination claims, and that finding is not contested on appeal.

After the jury verdict, Scott renewed its motion for judgment as a matter of law, Fed.R.Civ.P. 50(b), reasserting the arguments made in its earlier motion. Scott also moved for a new trial, Fed.R.Civ.P. 59, based on what it believed to be erroneous and prejudicial jury instructions given by the district court. The court denied Scott's motions, Woodson v. Scott Paper Co., 898 F.Supp. 298 (E.D.Pa.1995), and Scott now appeals on four separate grounds: (1) the district court erred in denying Scott's motion for judgment as a matter of law on Woodson's retaliation claims because the evidence was insufficient to show a causal link between Woodson's 1989 and 1990 discrimination complaints and his 1992 firing; (2) the district court erred in denying Scott's motion for judgment as a

matter of law on Woodson's retaliation claim under the PHRA because Woodson failed to exhaust his administrative remedies under the Act; (3) the district court should have granted Scott's motion for a new trial because it improperly instructed the jury that the racial graffiti that appeared in the bathroom of the Chester plant was "direct" evidence of Scott's unlawful motive; and (4) the district court should have granted Scott's motion for a new trial because it incorrectly instructed the jury that retaliation need only be a "motivating factor" for the termination in order to find for Woodson instead of charging that retaliation must have had a "determinative effect" on the decision.

The district court exercised jurisdiction under 28 U.S.C. §§ 1331 and 1367(a), and we have appellate jurisdiction over the final order under 28 U.S.C. § 1291. We exercise plenary review over Scott's first two claims. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir.1993). A motion for judgment as a matter of law "should be granted only if viewing all the evidence which has been tendered and should have been admitted in the light most favorable to party opposing the motion, no jury could decide in that party's favor." Watters v. City of Philadelphia, 55 F.3d 886, 891 (3d Cir.1995) (citation and internal quotation marks omitted).

II. Sufficiency of Evidence Supporting Woodson's Retaliation Claims

A. Introduction

Section 704(a) of Title VII forbids an employer from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation ... under this

subchapter." 42 U.S.C. § 2000e-3(a). It is similarly unlawful under § 5(d) of the PHRA for an employer "to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual *920 has made a charge ... under this act." 43 Pa.S. § 955(d).

The allocation of the burden of proof for both the federal and state retaliation claims follows the familiar Title VII standards. Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3d Cir.1993); Waddell v. Small Tube Products, Inc., 799 F.2d 69, 73 (3d Cir.1986). These standards will vary depending on whether the suit is characterized as a "pretext" suit or a "mixed motives" suit. For Woodson's retaliation claim, which has proceeded under a "pretext" theory, the standards have been laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

[1][2] The plaintiff first must establish a prima facie case of retaliation: he must show that (1) he was engaged in protected activity; (2) he was discharged subsequent to or contemporaneously with such activity; and (3) there is a causal link between the protected activity and the discharge. Quiroga v. Hasbro, Inc., 934 F.2d 497, 501 (3d Cir.1991); Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir.1989). [FN2] The issue here concerns whether Woodson has presented sufficient evidence from which a jury could reasonably find a prima facie case of retaliation.

FN2. If the plaintiff succeeds, the burden of production shifts to

the defendant to "articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824; Burdine, 450 U.S. at 252-55, 101 S.Ct. at 1093-95; Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir.1994). The defendant's burden at this stage is relatively light: it is satisfied if the defendant articulates any legitimate reason for the discharge; the defendant need not prove that the articulated reason actually motivated the discharge. Fuentes, 32 F.3d at 763. At this point, the presumption of discrimination drops from the case. Id. To prevail at trial, the plaintiff must convince the factfinder "both that the reason was false, and that discrimination was the real reason." Hicks, 509 U.S. at 512, 113 S.Ct. at 2750; see also id. at 519, 113 S.Ct. at 2754 ("It is not enough ... to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."). This burden may be met in a variety of ways. See Fuentes, 32 F.3d at 764-65; Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3d Cir.1996) (en banc). In the end, the burden of proof remains with the plaintiff.

Scott concedes that the evidence presented at trial was sufficient to satisfy two of the three components of the prima facie case: Woodson engaged in protected activity--the filing of race discrimination charges with the EEOC and the PHRC--and he was discharged after he engaged in that activity. Scott contends, however, that the record is devoid of evidence from which a reasonable jury could find the requisite causal link between the protected activity and his eventual discharge.

[3] Our cases have established that temporal proximity between the protected activity and the termination is sufficient to establish a causal link. See, e.g., Jalil, 873 F.2d at 708. We have also held that the "mere passage of time is not legally

conclusive proof against retaliation." Robinson v. SEPTA, 982 F.2d 892, 894 (3d Cir.1993); see also Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173 (3d Cir.1997); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir.1996). In the Robinson case, almost two years passed between the protected activity and Robinson's discharge. However, the district court found that SEPTA had subjected Robinson to a pattern of harassment during that time period. We therefore held that there was sufficient evidence supporting a causal link: "The temporal proximity noted in other cases is missing here and we might be hard pressed to uphold the trial judge's finding were it not for the intervening pattern of antagonism that SEPTA demonstrated." Robinson, 982 F.2d at 895; see also id. ("The court could reasonably find that the initial series of events thus caused Robinson's and SEPTA's relationship to deteriorate, and set a pattern of behavior that SEPTA followed in retaliating against Robinson's later efforts at opposing the Title VII violations he perceived."). Thus, a plaintiff can establish a link between his or her protected behavior and subsequent discharge if ***921** the employer engaged in a pattern of antagonism in the intervening period. [FN3]

FN3. Because we conclude that the evidence is sufficient to establish a pattern of antagonistic behavior linking the discrimination complaints and Woodson's discharge, we need not consider whether other types of evidence might also support a causal link finding in the absence of temporal proximity.

Scott correctly points out that the protected activity Woodson engaged in-- filing complaints with the PHRC and EEOC in November 1989 and February 1990--is temporally remote from Woodson's termination in January 1992. Thus, the argument continues, Woodson can prevail only if a reasonable jury could

find that Scott engaged in a "pattern of antagonism" in the period between his administrative complaints and his firing. Scott contends that, even viewing the evidence in the light most favorable to Woodson, the evidence does not support a finding of a pattern of antagonistic behavior against Woodson that would allow Woodson to prevail on the causal link prong. Rather, according to Scott, the evidence points only to the conclusion that Woodson was terminated in a company-wide cost reduction program nearly two years after he filed his discrimination complaints and after Scott had already promoted him to the position he sought when he filed those complaints. Under such circumstances, Scott submits, no reasonable jury could find a causal link between Woodson's discrimination complaints and his discharge.

Woodson, in response, contends that the evidence is clearly sufficient to support a finding by a reasonable jury that between February 1990, when he filed the second of his administrative complaints, and his termination in 1992, Scott engaged in a pattern of retaliation against him. This pattern is said to include Scott's "setting Woodson up to fail" by hiring him as a product system leader in the poorly performing napkin division and then refusing to provide him with adequate resources; Scott's failure to respond appropriately to racist graffiti in its plant; and Scott's termination of Woodson pursuant to a "sham" ranking process performed by individuals who were not familiar with his employment record, but only with his charges of discrimination.

For the reasons that follow, we agree with Woodson that, viewing the evidence in the light most favorable to him, the district court did not err in finding the evidence sufficient to support a causal link between Woodson's administrative complaints and his discharge. While each piece of evidence

alone is not sufficient to support an inference of a pattern of antagonistic behavior, taken together the evidence is sufficient. Thus, while we will discuss each piece of evidence, and Scott's objections to them, in turn, we must determine whether the evidence is sufficient based on the whole picture. Cf. Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir.1990) ("A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario."). We also keep in mind, recognizing that much of the record is comprised of trial testimony, that the jury had "the unique opportunity to judge the credibility and demeanor" of the witnesses who testified at the trial, and that it reached its conclusions based in part on those observations. Quiroga, 934 F.2d at 502.

B. Evidentiary Review and Analysis

[4] After Woodson had filed his first administrative complaint, he received his 1989 performance evaluation which suggested that he work with an outside consultant to improve his "perception by superiors." The district court apparently believed that "this recommendation, appearing in a formal written evaluation, was a response to his perception of racial animus among his superiors." 898 F.Supp. at 303. Scott objects to the district court's reliance on this recommendation because Zohlman, the human resources director, had suggested in a conversation with Woodson in May or June 1989, before Woodson had filed his first complaint, that he consult a behavioral psychologist to improve his working relationships. Thus, according to Scott, the recommendation in the performance evaluation is not probative of retaliatory animus because the same recommendation was made to Woodson

before he filed the *922 discrimination complaint. While Woodson acknowledged that the conversation with Zohlman took place, and Scott's argument has considerable force, it is not conclusive, as it is clear to us that a jury could rely on the written performance evaluation to find a pattern of antagonism. More specifically, the jury was entitled to conclude (if it wished) that the recommendation was made "official" when it was included in the written evaluation, which was used to determine promotions and salary, and that this was done in response to Woodson's complaints to the PHRC and EEOC.

[5] Woodson also points to the fact that, soon after he was promoted, Zohlman suggested, during the course of a "congratulatory" phone call, that Woodson drop the administrative complaints against Scott. Woodson refused to do so. Pointing out that Zohlman did not participate in Woodson's ranking, Scott contends that this statement is irrelevant as a matter of law because it was a stray remark made by a non-decisionmaker. The record at trial, however, showed that Zohlman designed the ranking procedures and presented the results of the forced ranking, along with Wadsworth, to the Corporate Review Committee. He participated in the process through which Woodson was fired to such an extent that we cannot say that he was "outside the chain of decisionmakers who had the authority to hire and fire plaintiff," Gomez v. Allegheny Health Serv., Inc., 71 F.3d 1079, 1085 (3d Cir.1995), cert. denied, --- U.S. ----, 116 S.Ct. 2524, 135 L.Ed.2d 1049 (1996), which is our standard for determining whether statements are "stray remarks." But even if Zohlman's statement was a mere stray remark, it can constitute evidence of the atmosphere in which the forced ranking was carried out, and would, therefore, be relevant to the question whether Scott retaliated against Woodson after he filed his discrimination

complaints. See Antol v. Perry, 82 F.3d 1291, 1302 (3d Cir.1996). [FN4]

FN4. The same is true with respect to James Peiffer, Woodson's direct supervisor. Scott contends that evidence involving Peiffer, which we will discuss below, is irrelevant as a matter of law to this case because it points at most to Peiffer's retaliatory animus, and Peiffer was not involved in the ranking process through which Woodson was fired. We reject this contention for the reasons explained in the text.

The district court also noted that "[w]hen plaintiff was eventually promoted in 1990, after a number of requests, it was to lead the poorest performing division. He was paid at a lower level than similarly situated colleagues and denied adequate staffing and management support." 898 F.Supp. at 303 (citations omitted). We acknowledge that management has the clear right to assign its employees to positions where they can contribute most effectively to the firm's profitability, but we must agree with the district court that Woodson's assignment to this division, and the treatment just described, could at least support an inference by the jury that Scott responded to his discrimination complaints by granting him a promotion, but setting him up to fail in his new position. [FN5]

FN5. Scott contends that these are unsupported factual allegations because the district court cited to exhibits that were not admitted into evidence at trial (although they were premarked as exhibits and used during the cross-examination of Robert Desisto). Even if these exhibits were not before the jury, however, there was ample testimony that supports the same inference. Woodson testified about the problems with staffing in his division as well as the fact that the division was a

poor performer. Czepiel testified that it "was the weakest product system ... that we had in the company." Moreover, Robert Desisto, who was ultimately assigned to Woodson's division in October 1991, testified on cross-examination about the exhibits that the district court cited. Even though they were not admitted, the contents of those exhibits--Woodson's repeated requests for more staff as well as his belief that he was being set up for failure--were discussed during the course of the testimony, and were, therefore, before the jury.

[6] We have held that "an atmosphere of condoned [racial] harassment in a workplace increases the likelihood of retaliation for complaints in individual cases." Glass v. Philadelphia Elec. Co., 34 F.3d 188, 195 (3d Cir.1994) (internal quotation marks omitted); Aman, 85 F.3d at 1086. In other words, evidence of condoned harassment can support an inference by the fact-finder that the employee, having failed to respond to the harassment, also engaged in retaliatory conduct against the plaintiff. This precept is ***923** germane in view of the testimony that, in June or July of 1991, racist graffiti appeared on the wall of the men's bathroom in the Chester plant, coupled with Woodson's evidence that the company's response to the incident was inadequate. The jury was entitled to consider these factors when deciding whether Woodson's termination was in retaliation for his complaints. Later that year, Woodson applied for an important promotion, which he did not receive. While this may not prove much by itself, in conjunction with the other facts it could have been taken into account by the jury in finding a pattern of antagonism.

Testimony about the process by which Woodson was fired also was probative of a causal link between his discrimination complaints and his termination. First, two of the three company

officials who ranked the product system leader work group, Wadsworth and Czepiel, admitted that they were aware that Woodson had filed discrimination complaints when they ranked him. [FN6] Second, Zohlman and Peiffer were also aware of Woodson's discrimination charges when the ranking was carried out. Although neither participated directly in the ranking process, Zohlman designed the process and provided human relations support to the rankers and Peiffer was Woodson's direct supervisor at the Chester plant. [FN7] As we explained above, even if they were not directly evaluating Woodson in the process, their testimony is probative of the environment in which the employment decision was made.

FN6. Scott challenges the district court's reliance on this testimony on the ground that knowledge of the discrimination complaints by the decisionmakers cannot in and of itself support an inference of retaliation. While that is correct, decisionmakers' knowledge, taken together with other evidence, can support such an inference.

FN7. The district court erred in suggesting that Peiffer and Zohlman "discussed these rankings with the evaluators during the ranking process." 898 F.Supp. at 303. At least, we have found no support for this statement in the record, nor has Woodson pointed us to any. Nevertheless, the jury was entitled to consider Peiffer's and Zohlman's testimony that they knew of the discrimination charges.

Moreover, two of the evaluators, Wadsworth and Goldberg, admitted that they had little first-hand knowledge of Woodson's past performance record and that they did not review his personnel file in making their evaluations. Hence, they were unaware of Woodson's consistently high performance reviews

during his tenure at the Chester plant. Such testimony would provide support for Woodson's contention that the ranking process was a "sham," as he was evaluated by managers who knew of the discrimination complaints but not of his past performance at the plant. The third evaluator, Czepiel, stated in his affidavit that he considered Woodson a "borderline insubordinate" in his rejection of certain cultural changes that Scott was trying to implement. The district court noted that the jury may have concluded that what Woodson's superiors considered to be the "ultimate act of insubordination" was his filing of administrative (discrimination) charges. 898 F.Supp. at 304. We believe that the jury could have reasonably drawn such an inference.

[7] In addition, the discrepancies between Woodson's ranking and his past performance evaluations were not presented to the Corporate Review Committee, as they should have been under the reorganization plan. Scott contends that this is not probative of a causal link because all of the employees who were evaluated during the reorganization were subjected to the same process--their performance evaluations were not considered by either the initial evaluators or the Corporate Review Committee. Woodson, however, need not have been treated differently during the reorganization process for the jury to conclude that a causal link existed between his complaints and his termination. Under the facts described above, the decision to terminate Woodson may have been related to his discrimination complaints even if there was no disparate treatment with respect to the process by which he was fired.

Finally, a confidential "work shedding" memorandum, which was prepared by Peiffer, recommended eliminating Woodson's job, but predicted that "an emotional reaction from [Woodson]

could result in an age/race discrimination claim." The record shows *924 that the "work shedding" process, in which the plant managers were involved, was part of the overall reorganization effort, but was unrelated to the ranking carried out by Wadsworth, Czepiel, and Goldberg. This memorandum was drafted on December 17, 1991, and was provided to the evaluation team and to Zohlman after the ranking was completed, but before the recommendations were presented to the Corporate Review Committee. [FN8] Scott, therefore, contends that this memo is not probative of retaliation because there is no evidence that actually links the memo to the decision to fire Woodson.

FN8. The district court's comment that this memorandum was provided to the assessment team prior to the "final" decision about Woodson's job is technically correct.

Although there was no testimony at trial that this memorandum actually affected the decision to fire Woodson, it too would have been probative of the environment in which the employment decision was made. It also suggests that Woodson's superiors were keenly aware of the discrimination complaints that Woodson had lodged against the company. The jury could have drawn many conclusions from this evidence, but we agree with the district court that "[t]hese predictions could reasonably have been interpreted by the jury as warnings based on the previously filed discrimination charges--warnings that went unheeded." Id. at 303.

Although the question is very close, we conclude that the evidence presented at trial, when viewed in the light most favorable to Woodson, is sufficient to support a causal link between Woodson's discrimination complaints and his

termination. The jury might reasonably have concluded that Scott engaged in a pattern of antagonistic behavior against Woodson after his complaints, setting him up to fail in a poorly performing division and then terminating him through a "sham" ranking procedure. Although none of the pieces of evidence that we have discussed, standing alone, would be sufficient to allow this inference (especially the "environment" evidence), the evidence as a whole can be so, particularly when we consider, as we must, that the verdict may have been based in part on the jurors' evaluation of each witness' credibility and demeanor.

III. Pennsylvania Human Relations Act Claim

A. Introduction

[8] We turn next to Scott's argument that the district court erred in not entering judgment in Scott's favor on Woodson's retaliation claim under the PHRA. [FN9] According to Scott, Woodson failed to initiate administrative proceedings as required under the PHRA because no verified complaint was filed with the PHRC, and Woodson has admitted as much. If Scott is successful here and the PHRA claim must be dismissed, Woodson can proceed only under Title VII. In such event, the verdict, with a few exceptions, would be subject to the $300,000 damages cap of Title VII, 42 U.S.C. § 1981a(b)(3), and hence Woodson's damage recovery would be reduced significantly. [FN10] If Scott is wrong, Woodson can proceed under *925 the PHRA and can recover the full amount of the jury verdict.

FN9. We reject Woodson's contention that Scott waived this defense. Although Scott never pleaded this issue as an affirmative defense, it denied in its answer Woodson's allegation that he had exhausted his administrative remedies. Answer ¶ 6.

Moreover, Scott made the same argument in its summary judgment motion, in its final pre-trial memorandum, and at trial, and also asked relevant questions in its request for admissions. This was enough to preserve the defense. We have held that the failure to assert an affirmative defense in an answer will not result in waiver if the opposing party has notice of the defense sufficient to avoid prejudice. See Charpentier v. Godsil, 937 F.2d 859, 864 (3d Cir.1991) ("It has been held that a defendant does not waive an affirmative defense if he raised the issue at a pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond." (internal quotations omitted)). For example, in Franklin Life Insurance Co. v. Bieniek, 312 F.2d 365, 371-72 (3d Cir.1962), we found that the defendants' fraud defense had not been waived, even though it was not pleaded, because the defendants had raised the issue in their answer and pre-trial statement.

FN10. Section 1981a(b)(2) expressly excludes "backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964" from the definition of compensatory damages. While backpay would clearly be excluded from the cap, it is not clear whether future earnings would be as well, but we need not decide that here. The district court must do so on remand.

[9] To bring suit under the PHRA, a plaintiff must first have filed an administrative complaint with the PHRC within 180 days of the alleged act of discrimination. 43 Pa.S. §§ 959(a), 962. If a plaintiff fails to file a timely complaint with the PHRC, then he or she is precluded from judicial remedies under the PHRA. The Pennsylvania courts have strictly interpreted this requirement, and have repeatedly held that "persons with claims that are cognizable under the Human Relations Act must avail

themselves of the administrative process of the Commission or be barred from the judicial remedies authorized in Section 12(c) of the Act." Vincent v. Fuller Co., 532 Pa. 547, 616 A.2d 969, 974 (1992); see also Fye v. Central Transp. Inc., 487 Pa. 137, 409 A.2d 2 (1979); Clay v. Advanced Computer Applications, Inc., 522 Pa. 86, 559 A.2d 917 (1989); Richardson v. Miller, 446 F.2d 1247, 1248 (3d Cir.1971) ("Since plaintiff failed to file a charge with the respective Commissions within the appropriate time periods, he is now foreclosed from pursuing the remedies provided by the Acts.").

As the Pennsylvania Supreme Court has explained, the Pennsylvania legislature, recognizing the "invidiousness and the pervasiveness of the practice of discrimination," created with the PHRA "a procedure and an agency specially designed and equipped to attack this persisting problem and to provide relief to citizens who have been unjustly injured thereby." Fye, 409 A.2d at 4. Strictly interpreting the filing requirement of the PHRA allows the PHRC to use its specialized expertise to attempt to resolve discrimination claims without the parties resorting to court.

On July 22, 1992, Woodson filed an administrative charge with the EEOC alleging the facts supporting the claim now on appeal. Such filing is a prerequisite for suing on his Title VII claim, 42 U.S.C. 2000e-5. Woodson, however, did not check the box on the EEOC charge form indicating that the charge should be filed with both agencies. Moreover, he signed an acknowledgment on the same day that "I have received a letter advising me of my right to file a complaint under the Pennsylvania Human Relations Act. I am aware that I must file with PHRC within 30 days, or else I will lose those rights to relief under state law safeguarded by filing under the [PHRA]."

Yet Woodson did not file a complaint with the PHRC, and admitted in response to Scott's request for admissions that the EEOC complaint was never cross-filed by the EEOC with the PHRC. [FN11]

FN11. The request for admission stated: "James W. Woodson did not file a charge of discrimination with the PHRC based on the acts alleged in EEOC Charge Number 170921474, and Mr. Woodson's EEOC Charge Number 170921474 was not cross-filed with the PHRC." A92 (Request for Admission No. 16).

Although Woodson never filed a complaint with the PHRC, and the complaint was never cross-filed with the PHRC, he nonetheless maintains that he may bring suit under the PHRA. First, he contends that, pursuant to the worksharing agreement entered into by the PHRC and the EEOC, Woodson's claim was "deemed" filed with the PHRC when he filed his charge with the EEOC. Second, he argues that, even if the claim was never filed with the PHRC, he should still be able to proceed with his PHRA retaliation claim because of representations made by the EEOC to him that it would file his claim with the PHRC. In this respect, Woodson urges us to affirm the reasoning of the district court, which permitted Woodson to recover for retaliation under the PHRA because the "EEOC's notice to the plaintiff should be considered an equitable filing." 898 F.Supp. at 302. We consider each of Woodson's contentions in turn.

B. Effect of the Worksharing Agreement

[10] Turning first to Woodson's worksharing agreement argument, the PHRC and the EEOC have entered into an agreement through which they have apportioned initial

jurisdiction over discrimination complaints in order to avoid unnecessary duplication of investigatory time and effort. Under this agreement, each agency waives its right to initially review claims that are first filed with *926 the other agency. Woodson contends that, pursuant to this worksharing agreement, his charge was "automatically and simultaneously deemed filed" with the PHRC as soon as it was filed with the EEOC.

[11][12] We agree with Scott, however, that the agreement between the EEOC and the PHRC is relevant only to the issue of whether a plaintiff has satisfied the administrative exhaustion requirements of the federal anti-discrimination statutes. That is because federal courts lack jurisdiction to hear a Title VII claim, unless the plaintiff has filed a charge with the EEOC. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974). A claimant cannot file a charge with the EEOC in a state, such as Pennsylvania, that provides an administrative remedy for employment discrimination, unless the charge has been filed first with the appropriate state agency and either (1) 60 days have elapsed; or (2) the state agency has terminated its proceedings. 42 U.S.C. § 2000e-5(c).

Under the worksharing agreement, a claim that is filed first with the EEOC can be processed by the EEOC, without being investigated as an initial matter by the PHRC. Through this worksharing agreement, therefore, Pennsylvania has waived its statutory right to initially process discrimination claims, and hence this agreement operates to "terminate" the PHRC proceedings with respect to those complaints that are filed first with the EEOC. Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 879 (3d Cir.1990) (Title VII claim); see also EEOC v. Commercial Office Products Co., 486 U.S. 107, 108 S.Ct. 1666, 100 L.Ed.2d 96 (1988); Kaimowitz v. Board of Trustees

of the University of Illinois, 951 F.2d 765 (7th Cir.1991) (ADEA claim). In other words, the worksharing agreement allows a plaintiff to proceed in court under Title VII without first filing with the PHRC. [FN12]

FN12. The worksharing agreement clearly divides responsibility for processing claims that have been dual-filed with both the EEOC and the PHRC. That is, if Woodson had filed with the EEOC and indicated that he wished to cross-file with the PHRC, the worksharing agreement would have governed the processing of his claim. But the Pennsylvania courts have ruled that, if the EEOC transmits the claim to the PHRC, the filing requirement of the PHRA has been satisfied. The Pennsylvania Superior Court has held that the verified complaint filing requirement of the PHRA is satisfied if the EEOC actually transmits the EEOC charge to the PHRC. See Lukus v. Westinghouse Elec. Corp., 276 Pa.Super. 232, 419 A.2d 431 (1980). In that case, the Superior Court noted that the EEOC charge satisfied the pleading requirements of 43 Pa.S. § 959, and moreover, that the PHRC treated the EEOC charge as capable of triggering PHRC action since it notified the EEOC that it was terminating its investigation of plaintiff's complaint. Id., 419 A.2d at 452-53. The Pennsylvania Supreme Court has cited Lukus, in dicta, for the proposition that the PHRA filing requirement is satisfied if the EEOC forwards a charge to the PHRC. Vincent v. Fuller Co., 532 Pa. 547, 616 A.2d 969, 971 (1992). In this regard, we note that Woodson's case would be quite different if he had marked the box for the EEOC to cross-file and the EEOC had failed to transmit the charge because of a breakdown in the administrative system. As that case is not before us, however, we do not decide it here.

That, however, does not mean that a plaintiff can initiate PHRC proceedings as required by the PHRA merely by filing with the EEOC. [FN13] Whether a plaintiff has initiated *927 PHRC proceedings under the PHRA is a state law issue. The worksharing agreement says nothing about whether a plaintiff has invoked PHRC procedures if the PHRC has never received his or her claim, nor could it, given that the Pennsylvania Supreme Court held in Fye v. Central Transportation Inc., 487 Pa. 137, 409 A.2d 2 (1979), that EEOC procedures are not a sufficient surrogate for PHRC remedies.

FN13. As Woodson points out, cases from other circuits have suggested that, under worksharing agreements between the EEOC and other state agencies, filing with the EEOC can operate to initiate proceedings in the state agency. See, e.g., EEOC v. Green, 76 F.3d 19 (1st Cir.1996); Griffin v. City of Dallas, 26 F.3d 610, 612-13 (5th Cir.1994) (holding that, under the terms of the agreement between the EEOC and the Texas state agency, the filing of a charge with the EEOC instituted state proceedings within the meaning of § 706(e)(1) of the Civil Rights Act); Hong v. Children's Memorial Hosp., 936 F.2d 967, 970-71 (7th Cir.1991) (holding that "workshare agreement can alone effect both initiation and termination of state proceedings and that, as a result, plaintiffs may file with the EEOC without first filing with the [state agency]"). In these cases, however, the issue was whether the claimant had properly satisfied the exhaustion requirements of Title VII, not whether a worksharing agreement can operate to initiate state proceedings such that the requirements of the state anti-discrimination laws can be satisfied. For example, in Green, the issue was whether the claimant had initiated proceedings with the state agency such that she had up to 300 days after the allegedly discriminatory

act, rather than 180 days, to file a charge with the EEOC under § 706(e)(1) of Title VII.

In the Fye case, the plaintiff had initially filed a complaint with the PHRC, but had requested that the PHRC terminate its investigation and defer to pending EEOC proceedings regarding the same conduct. [FN14] The plaintiff sought equitable relief for gender discrimination, and the question was whether her initial resort to the administrative procedures of the PHRA without exhausting them precluded filing suit. The plaintiff contended that "since the role of the agency was carried out, albeit not by the designated agency but by the Equal Opportunity Employment Commission, we should recognize substantial compliance with the statutory scheme and allow the court of common pleas to take jurisdiction under the circumstances." Id., 409 A.2d at 5.

FN14. Woodson suggests that Fye should not guide our inquiry because it was decided before the "applicable and controlling" worksharing agreement was entered into. Woodson, however, does not make any contention that the worksharing agreement in effect when Fye was decided was any different from the agreement at issue in this case, nor is there any support in the record for such a contention. Moreover, whether Woodson has exhausted his PHRA remedies is a question of state law, and is not controlled by the worksharing agreement.

The Pennsylvania Supreme Court rejected this argument on the ground that the statute clearly required that she exhaust state administrative procedures before filing suit: "If the General Assembly wished to permit the substitution of agencies in its legislative scheme, it could easily have provided for that result. It declined to do so and it is beyond our powers to ignore that

judgment absent some showing of a constitutional infringement." Id. Although Fye is not directly on point--it deals with whether a completed EEOC investigation can substitute for full resort to PHRC procedures--we predict that the Pennsylvania Supreme Court would hold that filing with the EEOC does not function as a filing for PHRA purposes. See also Clay, 559 A.2d at 919 ("The use by the legislature of the word 'shall,' as opposed to 'may,' expresses an intent to make administrative procedures under the PHRA a mandatory rather than discretionary means of enforcing the right created thereby.").

[13] Thus, evidence of the worksharing agreement alone cannot serve to show that Woodson invoked the Pennsylvania state administrative remedy as required by the PHRA. [FN15] This holding is consistent with the result reached by the district courts of this Circuit that have considered this issue. See, e.g., Parsons v. City of Philadelphia, 833 F.Supp. 1108, 1114 (E.D.Pa.1993). As a general matter, therefore, if the PHRC does not receive a complainant's claim, then that complainant cannot bring suit under the PHRA.

FN15. We note that Kedra v. Nazareth Hospital, 857 F.Supp. 430 (E.D.Pa.1994), on which Woodson relies, is not to the contrary. In that case, the plaintiff filed a discrimination charge with the Philadelphia Commission on Human Relations (PhilaCHR), and the EEOC was informed of the claim pursuant to a worksharing agreement between the PhilaCHR and the EEOC. Kedra did not, however, file a complaint with the PHRC. The question there was whether "filing a charge with the Philadelphia Commission on Human Relations is tantamount to a filing with the Pennsylvania Human Relations Commission." Id. at 432. The court

predicted that the Pennsylvania Supreme Court would hold that filing with the PhilaCHR constitutes compliance with the PHRA because of the PhilaCHR's statutory obligation to notify the PHRC of the complaints filed with it. In so holding, the court explicitly noted that it did not reach the plaintiff's contention that the worksharing agreement between the EEOC and the PHRC operated to satisfy the administrative exhaustion requirement of the PHRA. In fact, that court acknowledged the Fye statement that the Pennsylvania legislature could have provided for the substitution of agencies if it so wished, and distinguished a filing with the EEOC from a filing with the PhilaCHR because "the Pennsylvania General Assembly explicitly contemplated that complainants could file with local commissions and that the local commissions would, in turn, notify Pa.HRC of those filings." Id. at 433 n. 6.

C. Equitable Filing

[14] Woodson has admitted that the PHRC never actually received his complaint. ***928** This case is complicated, however, by the fact that there is evidence of a letter from the EEOC to him that states: "You should be aware that the Commission will provide a copy of your charge to the below listed agency in accordance with our procedures." The PHRC is the agency listed at the bottom of the paragraph. This letter is dated July 29, 1992, one week after Woodson signed the acknowledgment that he must file with the PHRC or lose any available state remedies. We must, then, reach Woodson's second contention, that even if the worksharing agreement does not permit a complainant to satisfy the filing requirement of the PHRA by filing a claim with the EEOC only, Woodson is entitled to recover under his PHRA claim in this case because of these representations made by the EEOC. To reach this

issue, we must make two separate predictions about Pennsylvania law: first, whether the Pennsylvania Supreme Court would hold that the PHRA filing requirement could be satisfied based on some notion of "equitable filing," and second, even if it would, whether that court would allow Woodson to proceed under the PHRA based on this theory.

It is not clear whether the Pennsylvania Supreme Court would adopt an equitable filing doctrine. As we explained above, the Pennsylvania Supreme Court has strictly enforced the PHRA filing requirement in many cases. In predicting that the Pennsylvania Supreme Court would adopt an equitable filing doctrine, the district court failed to recognize this. The district court only noted language from the PHRA that the "provisions of this act shall be construed liberally for the accomplishment of the purposes thereof." 43 Pa.S. 962(a). The court cited, but ultimately chose to ignore, language from Fye, in which the Pennsylvania Supreme Court cautioned that a "liberal construction for the accomplishment of the purposes of the act is not synonymous with a relaxation of the rule of exclusivity for the benefit of a complainant." Fye, 409 A.2d at 5.

We conclude that the district court erred in failing to give enough weight to Fye and the other Pennsylvania Supreme Court cases that have strictly adhered to the filing requirement of the PHRA. We are not, however, convinced that the Pennsylvania Supreme Court would refuse to apply equitable principles to excuse from the PHRA filing requirement a plaintiff who has been informed by the EEOC that the EEOC will forward a copy of the charge to the PHRC and who relies on that representation in not filing directly with the PHRC. This is particularly so because the Pennsylvania Supreme Court has suggested that the PHRA is in fact satisfied if the EEOC

forwards the charge to the PHRC. See supra note 12. The question is close, with significant arguments on both sides that we detail in the margin. [FN16]

FN16. Scott maintains that the Pennsylvania Supreme Court cases are clear that the PHRA exhaustion requirement is a strict one and that only the Pennsylvania legislature can amend the PHRA to introduce equitable principles into the filing requirement. In fact, the Pennsylvania General Assembly recently amended the PHRA to permit the application of equitable principles with respect to the time requirements for filing a complaint. The PHRA now provides that the "time limits for filing under any complaint or other pleading under this act shall be subject to waiver, estoppel and equitable tolling." 43 Pa.S. § 962(e). Scott contends that the legislature could have extended equitable principles to cases in which a plaintiff has not filed with the PHRC, but it chose not to.
On the other hand, Woodson points out that in no case in which the PHRA filing requirement has been strictly enforced has the EEOC represented to the plaintiff that it would file the complaint with the PHRC. Moreover, the district court relied on several cases in which courts have applied equitable notions to excuse the failure of the plaintiff to comply with the administrative exhaustion requirement. For example, in Hicks v. ABT Assoc., Inc., 572 F.2d 960 (3d Cir.1978), this Court permitted a plaintiff to proceed under Title VII where the plaintiff's failure to file a charge resulted from the EEOC's failure to comply with its statutory or regulatory obligations under the theory that a plaintiff should not be punished for the behavior of the EEOC. Woodson also points us to cases in which courts have allowed plaintiffs, under certain circumstances, who failed to comply with the applicable filing deadlines under Title VII to proceed with their claims under the

doctrine of equitable tolling. See, e.g., Zipes v. TWA, Inc., 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982); Anderson v. Unisys Corp., 47 F.3d 302 (8th Cir.), cert. denied, --- U.S. ----, 116 S.Ct. 299, 133 L.Ed.2d 205 (1995).

It is not clear, however, that the cases cited by the district court and by Woodson are relevant to the case at bar. Most significantly, the cases mentioned above concern the federal anti-discrimination laws. Woodson has not cited to any indication by the Pennsylvania Supreme Court that the PHRA filing requirement would be applied flexibly where the plaintiff's failure to satisfy the requirement resulted from the EEOC's failure to forward the charge as promised. Moreover, while the timing requirements of the federal anti-discrimination laws have been held to be a procedural requirement rather than a jurisdictional limitation, it may well be that the filing requirement of the PHRA is a jurisdictional limitation, and hence, would not be subject to equitable principles. As noted above, we leave this complicated problem to another day.

***929** Fortunately, however, we need not reach that issue, as it is clear to us that Woodson would not be entitled to proceed under the PHRA even if the Pennsylvania Supreme Court would permit the application of equitable principles. That is because there is no evidence that would support Woodson's contention that he should be excused for his failure to file, or cross-file, with the PHRC. First, Woodson had already retained counsel prior to the filing of his charge with the EEOC in July 1992. Second, Woodson had filed two prior discrimination complaints with the PHRC, and his testimony reveals that he knew of the cross-filing mechanism, as well as the requirement that he file with the PHRC. A944,950 ("[I]n this case I went first to EEOC and found out that you also have to go initially to the State of Pennsylvania Commission of Human Relations as a first base.").

Moreover, on July 22, 1992, the day he filed his charge with the EEOC and failed to check the box on the charge indicating that he wanted his charge cross-filed with the PHRC, Woodson signed the acknowledgment that he was aware of the filing requirements under the PHRA. Thus, the record is clear that he knew of his obligations under the PHRA and simply failed to comply, which would make him ineligible for application of equitable principles.

Additionally, there is no evidence in the record that Woodson received or even knew about the letter dated July 29, 1992 from the EEOC indicating that it would file the charge with the PHRC. Finally and most importantly, there is no record evidence that Woodson relied on this representation in choosing to forgo filing a PHRC complaint. Therefore, the district court erred in concluding that the evidence showed that Woodson intended that a complaint be filed with the PHRC. Under these circumstances, we could not conclude that Woodson's failure to file a complaint with the PHRC is excusable even if we were to predict that the Supreme Court of Pennsylvania would apply equitable principles to the filing requirement.

For the foregoing reasons, the judgment of the district court will be reversed in part, and the district court will be directed to enter judgment in Scott's favor on Woodson's PHRA claim.

IV. The Jury Instructions

[15][16] Scott also claims that the jury instructions were in error in two separate respects, and that we should remand for a new trial. We generally review jury instructions for abuse of discretion to determine whether they are misleading or inadequate. However, when the question is whether the

instructions misstate the law, our review is plenary. Savarese v. Agriss, 883 F.2d 1194, 1202 (3d Cir.1989). We review each of Scott's contentions in turn.

A. "Direct Evidence" Instruction

[17] We turn first to Scott's contention that the district court erred in instructing the jury with regard to the racist graffiti that appeared on a wall of the men's bathroom in the Chester plant in June or July of 1991. This charge read as follows:

There was evidence of race-biased graffiti in a bathroom at the Chester plant. An employer that permits such graffiti to exist may be held responsible for the racial bias conveyed by it if it condones the graffiti or acquiesces in it.

All of the facts and circumstances, including the employer's reaction, the steps, if any, taken by the employer to counteract the graffiti and what was reasonably required given the nature of the racial provocation, should be considered in deciding whether the employer's alleged lack of appropriate response bears on its racial attitude. In other words, it is direct evidence of the employer's intent to discriminate.

***930** Scott contends that the district court erred in instructing the jury that the racist graffiti incident can constitute "direct evidence" of Scott's retaliatory intent. [FN17] While we do not necessarily agree with Scott's argument, for the reasons that follow, we conclude that the district court erred in so instructing the jury.

FN17. Throughout this discussion, we refer to the "direct evidence" charge in terms of its relevance to the determination whether Scott fired Woodson with retaliatory animus, since the jury found against Woodson on the race discrimination claim. The charge itself refers only to discriminatory animus.

However, the court instructed the jury on both claims jointly, and the reference to "discriminatory" animus accordingly describes both claims.

We begin by noting that Scott's response to the graffiti incident is relevant to the question whether Scott acted with retaliatory intent. We have held on many occasions that an "atmosphere of condoned [racial] harassment in a workplace increases the likelihood of retaliation for complaints in individual cases." Glass v. Philadelphia Elec. Co., 34 F.3d 188, 195 (3d Cir.1994) (internal quotation marks omitted); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1086 (3d Cir.1996). Accordingly, we reject Scott's objection to the instruction on the ground that Woodson has shown no evidence connecting the graffiti to his employment with Scott or Scott's decision to fire him. The adequacy of Scott's response to the graffiti is clearly relevant to whether Scott had the requisite intent to be held liable for retaliation, even if the graffiti itself was never specifically linked to Woodson. Turning to the instruction itself, we find it, when considered as a whole, to be misleading to the lay juror on several levels and, therefore, prejudicial to Scott.

First, the instruction might have suggested to a juror that the existence of the racist graffiti itself, rather than Scott's response to the graffiti, can constitute evidence of retaliatory intent. The relevant portion of the charge begins: "There was evidence of race-biased graffiti in a bathroom at the Chester plant." While the charge then goes on to inform the jury that the adequacy of Scott's response is relevant to the issue of retaliatory animus, this aspect of the charge concludes with: "In other words, it is direct evidence of the employer's intent to discriminate." (emphasis added).

Although the charge as written was doubtless intended to refer only to Scott's response to the graffiti, and while that may be the fairest reading, we cannot gainsay that the instruction could have given a lay juror the impression that the graffiti itself could serve as evidence of Scott's retaliatory animus. In this respect, we highlight the fact that the last sentence of the charge concludes that "it" would be relevant to the question of discriminatory intent, without clearly specifying what "it" refers to. This could clearly lead a juror to infer that the racist graffiti itself was the "it" and to factor the graffiti itself into the consideration of whether Scott impermissibly retaliated against Woodson. Suggesting to the jury a connection between the graffiti itself and Scott would clearly be impermissible, as well as prejudicial to Scott, as there was no evidence whatsoever linking Scott or any of its decisionmakers to the graffiti.

[18][19] Second, the district court erred in instructing the jury that Scott's response to the graffiti could constitute "direct" evidence of retaliatory intent for two related reasons. First, as we see it, the adequacy of Scott's response to the graffiti incident is only circumstantial rather than direct evidence of Scott's discriminatory animus. Direct evidence is evidence "that proves an ultimate fact in the case without any process of inference, save ... the inferences of credibility." 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5214, at 265 (1978). In contrast, circumstantial evidence is offered to prove an ultimate fact, but an inferential step by the factfinder is required to reach that fact.

It seems clear to us that, even if the charge pointed only to Scott's response to the graffiti, this incident can be only circumstantial, rather than direct, evidence of Scott's intent when it fired Woodson. If the evidence showed that Scott's

response to the graffiti incident was inadequate, the factfinder would still be an inferential leap away from concluding that this was evidence of *931 Scott's retaliatory attitude. [FN18]

FN18. This conclusion is supported by our decision in Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 641 (3d Cir.1993), in which we noted that a "court may consider as circumstantial evidence the atmosphere in which the company made its employment decisions."

Moreover, later in the charge, the court defined direct evidence as "evidence given by a witness as to a fact which the witness has observed or perceived. An example would be an eyewitness." Even if the description of the graffiti incident as "direct" evidence alone would not have confused or prejudiced the jury, the charge is clearly misleading when considered in conjunction with the court's later definition of "direct" evidence. The court's instruction could have led a juror to equate evidence of the graffiti incident with eyewitness testimony, which quite likely would have caused a juror to accord too much weight to the graffiti evidence.

These errors were amplified by the fact that the racist graffiti incident was the only specific piece of evidence that the district court mentioned in the charge. This might have indicated to the jury that the graffiti incident, or the company's response to it, was somehow particularly important, and might have compelled an individual member of the jury to give this portion of the evidence more weight in his or her deliberations. This is a problem in its own right, for jurors should be free to weigh the evidence as they see fit. Moreover, by highlighting the graffiti incident in the charge, the district court might have called additional attention to the errors that we have explained above.

As we have explained, a juror could have come away from the jury charge with the impermissible impression that the graffiti itself was direct evidence of retaliatory animus. Because the "direct evidence" instruction plays such a prominent role in the jury charge, suggesting to a juror that this particular evidence should be given significant weight in his or her deliberations, the errors in the instruction might have been magnified. Thus, the suggestion that the graffiti itself was direct evidence of Scott's retaliatory intent, coupled with the fact that the graffiti incident was highlighted in the instruction, might have worked significant prejudice against Scott.

For the foregoing reasons, we conclude that the district court's "direct evidence" charge was inconsistent with the exercise of sound discretion. We reject Woodson's rejoinder that any error in the instruction is harmless because the instruction deals only with the discrimination claim, and not the retaliation claim. According to Woodson, the charge does not address retaliatory intent in any way, nor does it connect the graffiti incident to the retaliation claim, and hence, it could not have confused the jury with respect to the retaliation claim. The district court rejected this contention on the ground that, given the factual context, it is impossible to separate the race discrimination claim from the retaliation claim. We agree. The district court instructed the jury with respect to the discrimination and retaliation claims jointly, and did not at any point distinguish between the two claims. As we see it, the jury would have assumed that the charge referred to both claims, even though this portion of the charge refers specifically only to Scott's "racial attitude" and "intent to discriminate."

In a more general sense, we cannot hold the error to be harmless. Under our standard of harmless error in civil cases,

see McQueeney v. Wilmington Trust Co., 779 F.2d 916, 917 (3d Cir.1985), we cannot say that there is a high probability that the error did not affect the outcome of the case. We must, therefore, reverse the judgment and remand for a new trial on the retaliation claim.

B. Motivating Factor v. Determinative Effect

[20] Scott's next contention on appeal is that the district court erred in instructing the jury that it could hold Scott liable under Title VII and the PHRA for retaliation if Woodson's filing of complaints with the EEOC and the PHRC was a "motivating factor" in the decision to discharge him. [FN19] Scott argues *932 that the jury should have been instructed, under Griffiths v. CIGNA Corp., 988 F.2d 457, 472 (3d Cir.1993), and Miller v. CIGNA Corp., 47 F.3d 586, 595 (3d Cir.1995) (en banc), that, to find Scott liable, retaliatory animus must also have had a "determinative effect" on Woodson's termination.

FN19. The instruction read in part:
He need not prove that his race or the alleged retaliation was the only factor or reason in the employer's decision. But, he must prove that either race or retaliation was a motivating factor or reason. In other words, that it played a role in Scott's decision to terminate him.... In any event, in such a case, the ultimate question, the final question for the jury to decide is whether, based on all the evidence in the case, plaintiff has proven by a preponderance of the evidence that he was discharged either because of his race or in retaliation for filing the charges. In other words, that race or retaliation was a motivating factor, a factor that played a role in the employment decision to terminate him.

[21] We agree that Third Circuit precedent requires a district court to instruct the jury that it can hold a defendant liable only if the prohibited activity had a determinative effect on the decision to terminate the plaintiff. [FN20] In Griffiths, we ordered a new trial in a retaliation case proceeding under a pretext theory where the district court had erroneously instructed the jury that it need find only that an impermissible factor was a "motivating factor" to find for the plaintiff. We held that, while after Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), a motivating factor instruction is correct in a mixed motives case, Price Waterhouse did not change the analysis in pretext cases and hence a "motivating factor" instruction is improper in such cases. Griffiths, 988 F.2d at 471-72.

FN20. Our cases have heretofore applied the same standard in retaliation cases as in discrimination cases. Waddell v. Small Tube Products, Inc., 799 F.2d 69, 73 (3d Cir.1986). Moreover, Title VII standards generally apply in PHRA cases. Griffiths, 988 F.2d at 471 n. 14.

In Miller, a subsequent en banc decision, we clarified the standard that should be used in pretext cases, holding that a district court must instruct a jury that the plaintiff's burden is to prove that an impermissible factor "played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process." Miller, 47 F.3d at 588. Thus, it is clear that if Miller governs this case, as Scott argues, the instruction given was in error, because the "determinative effect" instruction should have been given. See Wilson v. Susquehanna Township Police Dep't, 55 F.3d 126, 130 (3d Cir.1995) (noting "determinative effect" standard).

The district court held, however, and Woodson argues on appeal, that the Civil Rights Act of 1991, Pub.L. No. 102-166, changed the legal landscape with respect to the standard of proof in such cases. Section 107(a) of the 1991 Act legislatively overruled the holding in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), that even if a plaintiff proved that discrimination was a motivating factor for an employment decision, an employer could still prevail if it could show that it would have reached the same decision even in the absence of the discriminatory motive. This section provides:

In General.-Section 703 of the Civil Rights Act of 1964 (42 U.S.C.2000e- 2) ... is further amended by adding at the end the following new subsection:

"(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated this practice."

Section 107(b) limits the available remedies in the case envisioned by the Price Waterhouse Court: where the plaintiff proves that discrimination was a motivating factor in the employment decision but the defendant responds by demonstrating that it would have reached the same result in the absence of the unlawful motive. In such a case, a court may not award damages and may only grant declaratory relief, certain injunctive relief, and the costs directly attributable to pursuing the claim under § 107(a). 42 U.S.C. § 2000e- 5(g)(2)(B).

Woodson contends that § 107 also effectively overruled Griffiths and Miller and, accordingly, applies to his case. Therefore, Woodson continues, the district court did not err in instructing the jury that Scott could be found liable if retaliation

was a "motivating factor" in the decision to fire Woodson. In response, Scott argues that § 107 of the 1991 *933 Act does not apply and that Griffiths and Miller govern Woodson's retaliation claim. It makes two separate contentions in support of this argument: (1) that § 107 does not apply to retaliation cases [FN21]; and (alternatively) (2) that § 107 does not apply to pretext, as opposed to mixed motive, cases. [FN22]

FN21. The district court held that Scott failed to object on this basis and hence waived the argument. Scott at trial made a general objection to the charge, stating: "Your Honor, just for the record, I'd like to note my objection to instructing on the motivating factor without adding a reference to 'had a determinative effect' on the case." The district court believed that Scott objected on the ground that § 107 did not apply to pretext cases, as Scott had filed a pre-trial brief to that effect. Because Scott did not object until after trial on the specific ground that § 107 does not apply in retaliation cases, the district court deemed this objection waived under Fed.R.Civ.P. 51. 898 F.Supp. at 305 & n. 17. In its appellate brief, Scott relied on its second argument and did not contest the district court's ruling on this point, though in a Fed.R.App.P. 28(j) submission Scott did press the point after argument.
Of course, even if the point was waived in the district court, we could reach the question if the the instruction was such that "the jury [was] without adequate guidance on a fundamental question and our failure to consider the error would result in a miscarriage of justice." McAdam v. Dean Witter Reynolds, Inc., 896 F.2d 750, 770 (3d Cir.1990); Bennis v. Gable, 823 F.2d 723, 727 (3d Cir.1987); see also Selected Risks Ins. Co. v. Bruno, 718 F.2d 67, 69 (3d Cir.1983) ("It is the general rule that a federal appellate court does not consider an issue not passed upon below. This rule is one of discretion,

rather than jurisdiction, and in the past we have heard issues not raised in the district court when prompted by exceptional circumstances." (footnote and citations omitted)). This is arguably so here in view of the importance of the legal issue to this case. We note too the plethora of employment discrimination cases pending in the district courts of this circuit. At all events, since this case must go back for a new trial, the district court will have to charge on the issue and will need guidance and hence we give it. We recognize that, if § 107 does not apply to pretext cases, we would not need to reach this issue, but we are not prepared to so hold at this time. On the other hand, if we were to hold that § 107 does apply to pretext cases, we would still have to reach the question whether § 107 applies to retaliation cases to resolve this issue. In sum, although Scott probably waived the point, we need to reach it anyway. The result, incidentally, confirms the need for a new trial.

FN22. We observe that, although Miller was decided after the effective date of the 1991 Act, it does not end our inquiry with respect to whether § 107 applies to pretext claims. Miller was brought under the Age Discrimination in Employment Act (ADEA). Although historically we have relied on Title VII in crafting ADEA law, we did not consider whether the 1991 Act changed the standard to be used in pretext cases in Miller because the "substantive provisions of the 1991 Act that amended Title VII did not amend the ADEA, and Miller does not contend that section 107 is applicable to ADEA cases." Miller, 47 F.3d at 599 n. 10.

We consider first whether § 107 applies to retaliation cases. As this is a question of statutory construction, we begin as always with the plain meaning of § 107. Section 107 on its face does

not apply to retaliation claims. It amends only 42 U.S.C. § 2000e-2, which prohibits discrimination "based on race, religion, or national origin," and does not mention § 2000e- 3, the retaliation provision. Moreover, the wording of the amendment does not even refer to retaliation claims, and explicitly governs cases involving claims of discrimination based only on "race, color, religion, sex or national origin." Hence there is no reference in § 107 to either retaliation claims in general or § 2000e-3 in particular, suggesting that Congress intended that § 107 not apply to retaliation claims. See Tanca v. Nordberg, 98 F.3d 680, 682-83 (1st Cir.1996) (holding that plain meaning of § 107 requires that it not be applied to retaliation claims), cert. denied, --- U.S. ----, 117 S.Ct. 1253, 137 L.Ed.2d 333 (1997); Riess v. Dalton, 845 F.Supp. 742, 744 (S.D.Cal.1993) (plain meaning of § 107 dictates exclusion of retaliation claims). If this is the case, then § 2000e-3 claims of illicit retaliation are governed by the "determinative effect" standard and Miller. [FN23]

FN23. Another court relied on a plain meaning argument to reach the opposite conclusion. In Heywood v. Samaritan Health System, 902 F.Supp. 1076 (D.Ariz.1995), the court cited to a commentator who has concluded that § 107 applies to retaliation claims because " '[t]he section does not state this explicitly, but the mixed motive clause defines the conditions under which an "unlawful employment practice" is established. The antiretaliation provision of Title VII appears under the specific heading of "[o]ther unlawful employment practices." ' " Id. at 1081 n. 1 (quoting 2 Lex K. Larson, Employment Discrimination § 35.04[1]). We are not persuaded by this argument. By its own terms, § 107 provides the standard fc. determining whether an employment practice is unlawful "[e]xcept as otherwise provided in this title." Because § 107

does not reference retaliation and § 2000e-3 provides a standard for deciding retaliation cases, we believe that the § 2000e-3 alone provides the standards for judging whether an action was taken in retaliation for protected activity.

Scott's argument that § 107 does not govern retaliation claims is supported by the fact that the 1991 Act elsewhere specifically mentions ***934** retaliation claims. Section 102 of the Act provides that compensatory and punitive damages are available in actions brought under § 2000e-2 and in actions brought under § 2000e-3. [FN24] It is generally the case that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983) (internal quotation marks omitted). Because Congress dealt with retaliation claims elsewhere in the 1991 Act, but not in § 107, it would seem reasonable to assume that § 107 does not apply to retaliation claims. See Tanca, 98 F.3d at 683-84; Riess, 845 F.Supp. at 745.

FN24. Additionally, although § 107(b), which governs the remedies when a plaintiff proves that an impermissible factor motivated the decision and the defendant demonstrates that the decision would have occurred in the absence of that factor, also does not mention retaliation, 42 U.S.C. § 2000e-5(g)(2)(A), the subsection that immediately precedes § 107(b) in codified form does reference claims brought under § 2000e-3. See Riess, 845 F.Supp. at 745 ("The fact that Congress expressly treated Section 2000e-3(a) violations in such close proximity to Section 107(b) demonstrates that where Congress intended to address retaliation violations, it knew how to do so and did so

explicitly.").

We are given pause by the fact that we and other courts have generally borrowed from discrimination law in determining the burdens and order of proof in retaliation cases. This understanding could lead us to the opposite result in considering this question. That is, we could say that Congress knew of the practice of borrowing in retaliation cases, and presumed that courts would continue this practice after the 1991 Act. Considering the question with this assumption in mind, Congress's failure to reference § 2000e-3 specifically in § 107 would not mean that § 107 does not apply in retaliation cases; rather, it would mean that Congress assumed that it was unnecessary for it to do so because courts would borrow the "motivating factor" language in deciding retaliation claims. [FN25]

FN25. The House Report states that "[t]he Committee intends ... that other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII." H.R.Rep. No. 40(II), 102d Cong., 1st Sess. 4 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 697. While this might be read to suggest that courts should apply the "motivating factor" standard in retaliation cases, it could also be read to encourage borrowing when deciding cases brought under different statutes rather than different provisions in the same statute. Assuming, moreover, that Congress knew of judicial borrowing in employment discrimination cases, we could reach the conclusion that Congress wanted to avoid borrowing in retaliation cases by referencing § 2000e-3 in some provisions of the 1991 Act but not in § 107.

We are not persuaded by this argument. The legislative history is at best unclear as to whether Congress intended that retaliation claims would be governed by § 107. It fails even to mention retaliation claims specifically. The most that Woodson points to are general statements that Congress intended to make it easier for plaintiffs to prevail in employment discrimination cases by legislatively overruling Price Waterhouse: "If Title VII's ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. Price Waterhouse jeopardizes that fundamental principle." H.R.Rep. 40(I), 102d Cong., 1st Sess. 47 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 585. We find that such statements do not evidence a clear intent that § 107 apply to retaliation cases. [FN26] It is a maxim of statutory interpretation that "[a]bsent a clearly expressed legislative intention to the contrary [the] language [of a statute] must ordinarily be regarded as conclusive." Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. *935 827, 835, 110 S.Ct. 1570, 1575, 108 L.Ed.2d 842 (1990) (internal quotation marks omitted).

FN26. One commentator has suggested that policy arguments also counsel against reading the motivating factor instruction into retaliation cases: "Congress may have been more concerned with protecting individuals directly discriminated against because of the prohibited factor itself than with those discriminated against because they opposed an unlawful practice." John L. Flynn, Note, Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking and Clear Statements, 83 Geo. L.J. 2009, 2018 n. 53 (1995).

We thus must be guided by plain meaning, and we conclude

that § 107 does not apply to retaliation cases. [FN27] Hence, the district court abused its discretion in failing to instruct the jury that improper motive must have had a determinative effect on the decision to fire Woodson, as we required in Miller. [FN28] Because we have concluded that § 107 of the Civil Rights Act of 1991 does not apply to Woodson's claim, we need not reach the second question: whether § 107 applies to "pretext" claims like Woodson's or whether it is limited to "mixed motive" claims. [FN29]

FN27. In reaching the holding that § 107 does not apply to retaliation claims, we note that while we follow some federal courts, see Tanca, supra; Riess, supra; see also David A. Cathcart & Mark Snyderman, The Civil Rights Act of 1991, C108 ALI-ABA 251, 292-93 (1994), other courts have apparently held that § 107 does apply to retaliation claims. Most of these courts, however, have applied § 107 to retaliation claims without analysis. See Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 893 (7th Cir.1996); Beinlich v. Curry Development, Inc., 1995 WL 311577, at *3 (4th Cir. May 22, 1995); Hall v. City of Brawley, 887 F.Supp. 1333 (S.D.Cal.1995); Doe v. Kohn, Nast & Graf, P.C., 862 F.Supp. 1310 (E.D.Pa.1994) (ADA case); see also Lewis v. American Foreign Serv. Ass'n, 846 F.Supp. 77, 82 (D.D.C.1993) (applying § 107 to retaliation cases brought under 42 U.S.C. § 1981 because courts borrow from Title VII, without considering whether § 107 applies to retaliation claims brought under Title VII). The only case cited to us by the parties that has specifically held that § 107 applies to retaliation cases, however, is not persuasive and does not apply basic principles of statutory construction as we have above. See Heywood, 902 F.Supp. at 1081 & n. 1 (acknowledging that neither § 107 nor the legislative history mention retaliation claims but concluding that

"it is certainly reasonable to assume that the Congressional policy articulated in the amendment and in the House report reaches retaliation as well as the enumerated considerations"). We are further persuaded that the motivating factor instruction was erroneous in this case because Woodson was awarded both compensatory and punitive damages. Under § 107(b), as we explained supra, a plaintiff who succeeds in showing that an illegitimate factor motivated his or her termination cannot be awarded damages if the employer demonstrates that it would have made the same decision in the absence of the illegitimate motive. The district court did not instruct the jury that it must determine whether Scott had shown that it would have fired him even in the absence of the retaliatory motive, as § 107(b) would seem to require.

FN28. The district court concluded that if there were any error in the instruction given, this error was harmless because the jury would have reached the same conclusion even if it had been properly charged. Because the jury, in awarding punitive damages, found that the defendant acted with "malice or reckless indifference to [plaintiff's] rights," the district court reasoned, the difference between "motivating" and "determinative" was immaterial. 898 F.Supp. at 308. We disagree. The jury could conceivably have concluded that Scott acted with malice toward Woodson when it decided to terminate him based in part on an illegitimate motive, even if that illegitimate factor did not have a determinative effect.

FN29. With respect to this question, we note that, according to Scott, the 1991 amendments were intended to overrule legislatively the standards of liability established in Price Waterhouse for mixed motives cases. The Supreme Court, in dicta, has acknowledged as much: "§ 107 responds to Price

Waterhouse v. Hopkins by setting forth standards applicable in 'mixed motive' cases." Landgraf v. USI Film Prods., 511 U.S. 244, 251, 114 S.Ct. 1483, 1489-90, 128 L.Ed.2d 229 (1994). Moreover, the Fourth Circuit, the only circuit that has specifically considered this issue, has held that § 107 only governs mixed motive cases. Fuller v. Phipps, 67 F.3d 1137, 1143-44 (4th Cir.1995).

While Scott's position has much to commend it, proper resolution of this question is far from clear. As the district court noted in rejecting Scott's contention in this regard, there is some support for the view that § 107(a) has created one standard to be applied in both pretext and mixed motive cases. The amendment itself is not limited to mixed motive cases, and the legislative history provides additional support for this position. See H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 45, 48-49 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 583, 586-87. Many courts have applied § 107(a) to pretext cases, albeit without discussion of this point, see, e.g., Harris v. Shelby County Bd. of Educ., 99 F.3d 1078 (11th Cir.1996); Hall v. City of Brawley, 887 F.Supp. 1333 (S.D.Cal.1995); Johnson v. El Paso Pathology Group, P.A., 868 F.Supp. 852 (W.D.Tex.1994), and several model jury instructions suggest doing so as well, see, e.g., American Bar Ass'n Model Jury Instructions for Employment Litigation 1.02[1]; 1.02[2][a] (1994). This court has expressly left open the question whether a "determinative effect" instruction should be given in a pretext case after the 1991 Act. Hook v. Ernst & Young, 28 F.3d 366, 368, 371 (3d Cir.1994). Because we dispose of this case on other grounds, we again decline to reach this issue.

At all events, whatever the standard should be, there is certainly considerable force to Judge Greenberg's view that one standard for both mixed motive and pretext cases would be far preferable, and have the additional benefit of simplifying and

clarifying employment discrimination law. See Miller, 47 F.3d at 599 (Greenberg, J., concurring) ("I would dispense altogether with the terms 'pretext' and 'mixed motives' and hold explicitly that the same standard applies to all disparate treatment cases.").

V. Conclusion

For the foregoing reasons, we will affirm in part and reverse in part. We agree with *936 the district court that the evidence is sufficient as a matter of law to support a jury finding of unlawful retaliation by Scott against Woodson and to that extent we affirm the denial of Scott's Rule 50 motion. However, because no verified complaint was filed with the Pennsylvania Human Relations Commission, we will reverse the denial of the Rule 50 motion in this respect and direct the district court to enter judgment in Scott's favor on Woodson's retaliation claim under the Pennsylvania Human Relations Act. Finally, because of errors in the jury instructions, we will reverse the denial of the Rule 59 motion and remand for a new trial on the retaliation claim. The parties shall bear their own costs.

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, Circuit Judges.

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC
May 6, 1997

The petition for rehearing filed by Appellee having been submitted to the judges who participated in the decision of this

Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

END OF DOCUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1758

JAMES W. WOODSON,
Appellee
v.
SCOTT PAPER CO.,
Appellant

(D.C. Civ. No. 06076)

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, Circuit Judges

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellee having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:
s/Edward R. Becker
Circuit Judge

Dated: May 6, 1997

Copyright (c) West Group 1997 No claim to original U.S. Govt. works

898 F.Supp. 298, Woodson v. Scott Paper Co., (E.D.Pa. 1995)

*298 898 F.Supp. 298

68 Fair Empl.Prac.Cas. (BNA) 947, 43 Fed. R. Evid. Serv. 354

James W. WOODSON
v.
SCOTT PAPER COMPANY.

Civ. A. No. 93-6076.
United States District Court,
E.D. Pennsylvania.

Aug. 4, 1995.

Employee sued former employer alleging unlawful discharge on account of race and retaliatory discharge for and filing discrimination complaints against employer. Jury returned verdict in favor of employee on both charges. Employer brought postverdict motion for judgment as matter of law, to alter judgment or, for new trial. The District Court, Ludwig, J., held that: (1) employee's administrative charge would be deemed to have been equitably filed with state Human Rights Commission; (2) evidence was sufficient to support finding of causal connection between employee's requests for promotion and discrimination allegations and his subsequent discharge; (3) evidence was sufficient to show that employer acted with malice or reckless indifference to employee's rights in discharging him, as required to support punitive damages award; (4) trial court's instruction to jury regarding whether race was a "motivating factor" in employee's discharge, if error, was harmless; (5)

employer's failure to respond to racist graffiti on workplace restroom walls could be regarded as direct evidence of employer's racial animus; (6) award of future earnings would be reduced pursuant to preverdict stipulation agreed upon between parties; and (7) prejudgment interest would be awarded on backpay award.

Motion granted in part, denied in part.

[WEST Keynotes Omitted]

*298 E.D.Pa. 1995.

Notwithstanding that both counsel in wrongful discharge action stipulated, before trial, to total backpay award of $150,000, that employee's counsel referred to amount as "$150,000 worth of past losses" and that employer's counsel said these were losses "up to today," court would award prejudgment interest on backpay award, since stipulation did not exclude prejudgment interest, and neither statement purported to exclude interest.

*300 Alan B. Epstein, Jablon, Epstein and Wolf, Philadelphia, PA, for plaintiff.

Steven R. Wall, Marina C. Tsatalis, Julie A. Uebler, Morgan, Lewis & Bockius, Philadelphia, PA, for defendant.

MEMORANDUM

LUDWIG, District Judge.

Defendant Scott Paper Company's post-verdict motion for judgment as a matter of law, to alter the judgment or, in the alternative, for a new trial, will be granted in part and denied in part. Plaintiff James W. Woodson's motion for prejudgment

interest will be granted. The verdict will be reduced to $1,496,698.70.

This employment discrimination action, filed November 16, 1993, was brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.;* the Pennsylvania Human Relations Act, 43 P.S. §§ 951 *et seq.;* the Civil Rights Act of 1866, 42 U.S.C. § 1981; and Pennsylvania common law. On December 23, 1994, summary judgment for defendant was granted in part. Order, No. 93-6076, Dec. 23, 1995; memorandum, No. 93-6076, Jan. 9, 1995. The remaining claims proceeded to trial on February 7, 1995.

At trial, the following evidence, as viewed most favorably to plaintiff, was adduced. In 1970, plaintiff, an African American, was recruited for employment by defendant Scott Paper Company to work as a chemical materials specialist in Philadelphia. Feb. 8, 1995, N.T. 24; Feb. 13, 1995, N.T. 9-10; Plaintiff's exh. 1, at 5, 93. He was soon promoted and for almost 20 years, through 1990, received numerous promotions, positive performance evaluations, merit wage increases, bonuses and awards. N.T. passim.

In November 1989 and February 1990, plaintiff filed charges of discrimination against defendant with the EEOC and the PHRC alleging that Scott had not considered him for top-level management positions because of his race. Feb. 8, 1995, N.T. 47-53; Feb. 13, 1995, N.T. 49-59. In October, 1990, he was promoted to product system leader of Light Weight Wet Strength--Napkins at defendant's Chester plant.

In the following year, defendant undertook a company-wide reorganization of its management team. A "forced ranking" or evaluation was made of 27 managers, and the bottom five were terminated. Plaintiff finished 25th and was terminated on January 27, 1992 without prior notice. Defendant's only other African American manager was also ranked in the bottom five.

The evaluations were performed without interviews, and two of the three evaluators had little familiarity with plaintiff's work. Plaintiff's annual evaluations were higher than or comparable to a number of the managers who were ranked above him.

On February 15, 1995 the jury returned a verdict in favor of plaintiff on his retaliatory discharge claim and for defendant on the race discrimination claim. Inherent in the jury verdict was the finding that the rating system used to select him for termination was pretextual. The verdict of $1,557,845 included $150,000 in back pay, $397,845 in future earnings, $10,000 for emotional distress, and $1,000,000 in punitive damages.

Defendant's post-verdict motion challenges the exhaustion of administrative remedies under the PHRA, the sufficiency of the evidence, and the jury instructions; and alternatively, the amount of the verdict. Plaintiff *301 (FN1)

I.

[1] Defendant contends that this court lacked jurisdiction over the PHRA claim because the prerequisite administrative charge was not filed with the Pennsylvania Human Relations Commission. (FN2) 43 Pa.S.A. § 962. Without jurisdiction over the Pennsylvania law claim, the verdict amount, other than backpay, (FN3) would be subject to the $300,000 limitation of Title VII, as amended. 42 U.S.C. § 1981a(b)(3). (FN4)

On July 22, 1992, plaintiff filed an administrative complaint with the EEOC alleging the facts giving rise to this action. Feb. 14, 1995, N.T. 5-6. However, he did not file with the PHRC, and his response to a request for admission concedes that his EEOC complaint was not cross-filed with the PHRC. Feb. 14, 1995, N.T. 5-6. (FN5) Also, on the EEOC charge form, he did not check the box requesting that the charge be filed with both agencies. Plaintiff's exh. 93. Nonetheless, by letter of July 29, 1992, the EEOC advised plaintiff, "You should be aware that

the Commission will provide a copy of your charge to the [PHRC] in accordance with our procedures." Plaintiff's response to defendant's motion for summary judgment, Oct. 18, 1994, exh. I. The record also includes a copy of a form from the EEOC to the PHRC, dated July 29, 1995, which purports to transmit plaintiff's charge to that agency. Plaintiff's exh. 93. (FN6)

Had the EEOC perfected the filing of the charge with the PHRC, in accordance with its letter and transmittal form, there would have been a sufficient PHRA filing for jurisdictional purposes. *Vincent v. Fuller Co.*, 532 Pa. 547, 551, 616 A.2d 969, 971 (1992), citing, *Lukus v. Westinghouse Electric Corp.*, 276 Pa.Super. 232, 419 A.2d 431 (1980). Plaintiff had no reason to believe a cross-

***302** In these circumstances, the EEOC's notice to plaintiff should be considered an equitable filing. Case law has not regarded the filing requirement jurisdictional where the failure or breakdown has been in the administrative system. *See Hicks v. ABT Assoc., Inc.*, 572 F.2d 960, 967 (3d Cir.1978) (jurisdiction existed under Title VII where EEOC improperly refused to accept administrative filing); *Griffiths v. CIGNA Corp.*, 857 F.Supp. 399, 405 (E.D.Pa.1994) (exhaustion of administrative remedies under PHRA is procedural and subject to estoppel and waiver); *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 10, 383 A.2d 791, 795-96 (1978) ("The rule requiring exhaustion of administrative remedies is not intended to set up a procedural obstacle to recovery"). PHRA's exhaustion of remedies provision mandates liberal construction to accomplish the Act's purposes. 43 Pa.S.A. § 962(a). (FN7) To deprive plaintiff of his state claim in this unusual situation would frustrate the remedial purpose of the statute. *See Parsons v. City of Philadelphia Coordinating Office of Drug and Alcohol Abuse Programs*, 833 F.Supp. 1108, 1113 (E.D.Pa.1993) (PHRA jurisdictional requirement could be met if plaintiff had received some notice from the EEOC that her charge would be dually filed). Under the EEOC-PHRC worksharing agreement,

(FN8) once the EEOC charge was filed, the PHRC's interest in the case was automatically terminated. *Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874, 879 (3d Cir.1990). As a result, the lack of perfected filing with the PHRC could not have worked any prejudice in practical terms to either that agency or defendant. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 108 S.Ct. 1666, 100 L.Ed.2d 96 (1988).

In an analogous setting, it was held that "a filing with the [Philadelphia Commission on Human Relations] constitutes actual and sufficient compliance with the PHRA." *Kedra v. Nazareth Hosp.*, 857 F.Supp. 430, 433 (E.D.Pa.1994). *See also Davis v. United States Steel Supply*, 581 F.2d 335, 339 (3d Cir.1978) (Pittsburgh Human Relations Commission filing satisfied PHRA). (FN9) *But see Herbert v. Greyhound Lines, Inc.*, No. 93-5447, 1994 WL 493732, *1 (E.D.Pa.1994) ("The mere filing of a Title VII complaint with the EEOC, however, does not constitute processing by the PHRC or satisfy the PHRA administrative requirements which have been held to be preclusive"). Under *Hicks v. ABT Assoc., Inc.* and other defective filing cases, there appears to be ample basis for jurisdiction over plaintiff's PHRA claim.

II.

[2] [3] [4] Defendant's motion also contests the sufficiency of the evidence. To establish a *prima facie* case of retaliatory discharge under Title VII, (FN10) a plaintiff must show that: "(1) he was engaged in protected activity; (2) he was discharged after or contemporaneous with the activity; and (3) a causal link existed between the protected activity and threats to sue, and the loss of his job." *Robinson v. SEPTA*, 982 F.2d 892, 895 n. 1 (3d Cir.1993), citing *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 501 (3d Cir.), *cert. denied*, 502 U.S. 940, 112 S.Ct. 376, 116 L.Ed.2d 327 (1991), and *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir.1989), *cert. denied*, 493 U.S. 1023,

110 S.Ct. 725, 107 L.Ed.2d 745 (1990). Defendant concedes the first two elements but maintains that plaintiff did not present the minimum

*303 To review the evidence on this issue, plaintiff's administrative charges, filed in November, 1989 and February, 1990, were pending at the time of his discharge, in January, 1992. (FN11) Two of the three evaluators who performed the "forced ranking" were aware of the charges when they assigned plaintiff the numerical grades that resulted in his termination. Feb. 9, 1995, N.T. 171-76, 187; Feb. 10, 1995, N.T. 9. Both the human services director and plaintiff's supervisor, who discussed these rankings with the evaluators during the ranking process, were also aware of his discrimination complaints. Feb. 9, 1995, N.T. 12; Feb. 10, 1995, N.T. 57-58. A "confidential work shedding memorandum" prepared by plaintiff's supervisor for the rankers predicted "An emotional reaction from [plaintiff] could result in an age/race discrimination claim," and an increase in employee racial tension. Plaintiff's exh. 69. (FN12) These predictions could reasonably have been interpreted by the jury as warnings based on the previously filed discrimination charges--warnings that went unheeded. (FN13)

Earlier, when plaintiff had filed his second administrative charge of discrimination, he was given a written performance evaluation recommending that he consult a behavioral psychologist in North Carolina. Feb. 13, 1995, N.T. 78. According to plaintiff, his work performance had remained constant. *Id.* at 71-79. Arguably, this recommendation, appearing in a formal written evaluation, was a response to his perception of racial animus among his superiors. It was also communicated to him orally. None of the evaluations mentioned his having any difficulty in getting along with his subordinates.

When plaintiff was eventually promoted in 1990 after a number of requests, it was to lead the poorest performing division. *Id.*

at 80-86. He was paid at a lower level than similarly situated colleagues and denied adequate staffing and management support. Plaintiff's exh. 10, 112, 125. This assignment was consistent with his theory that he was being set up for failure--and that this was the way the company had decided to deal with his discrimination charges. Moreover, according to plaintiff, the director of human resources for manufacturing had told him to withdraw the administrative complaints, which he refused to do. Feb. 13, 1995, N.T. 89, 185-86.

There was testimony that in June, 1991, racial graffiti appeared in a men's room at the Chester plant: "Nigger, I'm going to get you"; "Niggers are taking our jobs"; "Niggers who talk are niggers who hang." Feb. 13, 1995, N.T. 108. Plaintiff was the only black management employee there. Defendant's response to this type of hate speech was portrayed by plaintiff as inadequate, thereby buttressing the evidence of retaliatory motive. *See id.* at 110; Feb. 10, 1995, N.T. 93-98; Feb. 14, 1995, N.T. 47-56. Later that year, despite his qualifications, he assertedly was not given adequate consideration for an important promotion. Feb. 14, 1995, N.T. 25-26.

Other evidence supported plaintiff's claim that the ranking was a pretext for retaliation. He had an excellent employment record and strong performance evaluations over a period of more than 20 years. Feb. 8, 1995, N.T. 31-39; Feb. 9, 1995, N.T. 91, 102-04; Feb. 13, 1995, N.T. 29-33, 63-79; plaintiff's exh. 2, 3, 4, 5. However, two of the rankers admitted they had little first-hand knowledge of plaintiff and did not review his personnel file or performance evaluations. Feb. 2, 1995,

***304** The jury may also have been persuaded to find retaliatory intent by its evaluation of the demeanor and comportment of some of defendant's witnesses. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, ----, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant ... may, together with the elements of

the prima facie case, suffice to show intentional discrimination"). Each of the rankers as well as some of plaintiff's supervisors and colleagues testified over a period of seven days, reviewing the ranking process and plaintiff's performance in voluminous detail, with hundreds of graphs, charts and internal memoranda. It was elicited that one of the evaluators was of the opinion that plaintiff was a "borderline insubordinate." Feb. 9, 1995, N.T. 231-34. (FN14) After plaintiff began asking to be promoted, his performance evaluations contained references to difficulties in relating to superiors. Defendant's explanation is that plaintiff was unwilling to accept the new team management approach, known as "Asset Optimization." *Id.* Plaintiff disagreed and blamed the negative comments in the evaluations on his repeated promotion requests. This issue was argued to the jury, which could have concluded that plaintiff's superiors considered his administrative charges to be the ultimate act of insubordination. Until plaintiff sought to be promoted, his performance evaluations had been uniformly excellent. Viewed from plaintiff's perspective, the evidence of a causal link between the discrimination charges and his termination was substantial.

III.

[5] There was also sufficient evidence to withstand defendant's objections to the punitive damages award. The jury found that defendant acted with malice or reckless indifference to plaintiff's rights. (FN15) *See* 42 U.S.C. § 1981(a)(b)(1); *Jackson & Coker, Inc. v. Lynam*, 840 F.Supp. 1040, 1051 (E.D.Pa.1993), *aff'd*, 31 F.3d 1172 (3d Cir.1994). As outlined above, the evidence adequately supported that finding.

Specifically, there was evidence that plaintiff was promoted in 1990 in order to persuade him to withdraw his administrative complaints. When he would not do so, defendants attempted to ensure his failure on the job by denying him management resources. Even so, under his direction his division rose within

a year from last place in the company. Shortly thereafter, a purportedly neutral ranking system was utilized to discharge him. *Supra,* pt. I. The rankers and the director of human resources knew that retaliation was illegal. Feb. 9, 1995, N.T. 13-14, 171-76, 187; Feb. 10, 1995, N.T. 10. The evidence that plaintiff was regarded by at least one evaluator as "borderline insubordinate," whatever that may mean in a racial setting, underscored the likelihood of severe retaliatory animus.

IV.

Defendant asserts that the jury instructions were erroneous, necessitating a new trial, Fed.R.Civ.P. 59. The disputed instructions are the term "motivating factor" in the retaliation instruction--without the addition of "determinative effect"--and the use of the term "direct evidence" in an instruction relating to the evidence of racial graffiti.

***305** A.

As to plaintiff's burden of proof under Title VII and the PHRA, the jury was instructed as follows:

Under both of these acts, it is unlawful for an employer to discriminate against an employee because of his race or because the employee has filed an administrative charge of discrimination against the employer which is permitted by those acts.

If such discrimination, either because of race or in retaliation for the filing of a charge, results in an employment decision such as the employee's termination, it is an unlawful employment practice....

[Plaintiff] need not prove that his race or the alleged retaliation was the only factor or reason or the most important factor or reason in the employer's decision. But, he must prove that

either race or retaliation was a motivating factor or reason. In other words, that it played a role in Scott's decision to terminate him....

In any event, in such a case, the ultimate question, the final question for the jury to decide is whether, based on all the evidence in the case, plaintiff has proven by a preponderance of the evidence that he was discharged either because of his race or in retaliation for filing the charges. In other words, that race or retaliation was a motivating factor, a factor that played a role in the employment decision to terminate him.

Feb. 15, 1995, Charge 3-7.

The issue presented is whether the proper standard in a pretext case is "motivating factor," and not "determinative factor" or "determinative effect." In pretext actions arising before the Civil Rights Act of 1991, "determinative factor" or "determinative effect" has been the rule. *E.g., Starceski v. Westinghouse Electric Co.*, 54 F.3d 1089 (3d Cir.1995); *Wilson v. Susquehanna Township Police Dept.*, 55 F.3d 126, 130 (3d Cir.1995). However, the 1991 Act speaks solely of "motivating factor":

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). As to retaliation, the statute provide in an unamended section, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has made a charge ... under this subchapter." 42 U.S.C. § 2000e-3(a). (FN16) There has been no case reported specifically holding that "determinative" survives the 1991 legislation. That term, which also did not

appear in the prior law was a decisional outgrowth of the *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) formulation of "but for" causation. *See infra* at 21.

Defendant's first argument is that 42 U.S.C. § 2000e-2(m) does not apply to 42 U.S.C. § 2000-3(a) because it enumerates "race, color, religion, sex, or national origin," but not retaliation. At trial, the following objection was made:

Your Honor, just for the record, I'd like to note my objection to instructing on the motivating factor without adding a reference to "had a determinative effect" on the case. To the extent that you are instructing them similarly under the PHRA, I have the same objection.

Id. at 19. The specific ground for objection was that a motivating factor instruction does not apply to pretext cases. *See infra.* Defendant had filed a nine-page pretrial brief to this effect which contained no reference to statutory construction. Accordingly, this contention, not made until post-trial, is deemed waived. (FN17)

***306** But waiver aside, the evidentiary burden revisions in the 1991 Act were narrowly focused on *Price Waterhouse v. Hopkins* and the distinctions between disparate impact and disparate treatment cases. The use of the term "unlawful employment practice" was continued in the new discrimination subsections, 42 U.S.C. § 2000e-2(a)-(d). As section 2000e-2(m) makes clear, "Except as otherwise provided in this subchapter" the burden of proof in unlawful employment practice cases shall be "motivating factor." The only other burden of proof provision, 2000e-2(k), relates to disparate impact cases. The terms "race, color, religion, sex or national origin" are not restrictive and are the predicates for filing a retaliation claim. Our Circuit regularly applies the standard of

proof under § 2000e-2 to retaliation claims under § 2000e-3. *E.g., Griffiths,* 988 F.2d at 468-69; *Jalil,* 873 F.2d at 706-07.

To prescribe different standards of proof would be illogical and unnecessarily confusing. Here and in numerous other cases, *e.g., Jalil,* 873 F.2d 701 (3d Cir.1989), discrimination and retaliation claims arise as part of the same matrix. (FN18) The Fourth Circuit and district court cases have applied the 1991 amendments to retaliation cases. *See Beinlich v. Curry Development, Inc.,* 54 F.3d 772 (table), 1995 WL 311577, *3 (4th Cir. May 22, 1995) (unpublished disposition) (sections 2000e-2(m) and 2000e-3(a) together mandate motivating factor test in retaliation cases); *Hall v. City of Brawley,* 887 F.Supp. 1333, 1342 (S.D.Cal.1995) (applying 2000e-5(g)(2)(B), which incorporates 2000e-2(m), to retaliation case); *Lewis v. American Foreign Service Ass'n,* 846 F.Supp. 77, 82 (D.D.C.1993) ("Therefore, the Court deems it proper to apply the Civil Rights Act of 1991 ... to retaliation cases"); *Doe v. Kohn Nast & Graf, P.C.,* 862 F.Supp. 1310, 1316 (E.D.Pa.1994) (§ 2000e-2(m) applies to retaliation cases). *See also* Edward J. Devitt et al., Federal Practice and Instructions § 104.03 (4th ed. 1992 & Supp.1994) (including retaliation claim within motivating factor instruction). *But see Riess v. Dalton,* 845 F.Supp. 742, 744-45 (S.D.Cal.1993).

Defendant's chief argument at trial was that § 2000e-2(m) was meant to apply only to "mixed motive" cases. This case proceeded on a "pretext" theory. Accordingly--defendant reasoned--§ 2000e-2(m), despite its inclusive and unambiguous language, should be disregarded in favor of a "determinative effect" instruction a la *Miller v. CIGNA Corp.,* 47 F.3d 586 (3d Cir.1995), an ADEA case. (FN19)

There is no clear consensus regarding the application of § 2000e-2(m) to pretext cases. *Compare Davies v. Philip Morris, U.S.A.,* 863 F.Supp. 1430, 1437 (D.Colo.1994) ("To prevail on sex discrimination claim under Title VII, a plaintiff

must prove, either directly or indirectly that her sex was a motivating factor for the employment action of which she complains") *with Hennessy v. Penril Datacomm Networks*, 864 F.Supp. 759, 762 (N.D.Ill.1994) (no application unless sufficient direct evidence for mixed motives instruction). (FN20) Standard jury instruction manuals

***307** Prior to these amendments ... liability standards depended upon whether the case was classified as a "pretext" case or a "mixed motive" case. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Under the Civil Rights Act of 1991 ... the plaintiff prevails on the issue of liability if he or she shows that discrimination was a "motivating factor" in the challenged employment decision.

See also American Bar Association Model Jury Instructions for Employment Litigation 1.02[1], 1.02[2][a] (1994) (using "motivating factor" regardless of nature of evidence); Edward J. Devitt et al., Federal Practice and Instructions, *supra* at 18 § 104.03.

Many courts also utilize § 2000e-2(m) in both mixed motive and pretext cases. *Iqbal v. Berkeley Marina Marriott Management*, No. 93-3575, 1995 WL 166026, *2 (N.D.Cal. April 5, 1995) (motivating factor standard regardless of type of case); *Hall*, 887 F.Supp. at 1342 ("Where the court finds that discrimination was a motivating factor in the adverse employment action, a violation of Title VII is established"); *Gray v. Brown*, No. 93-2732, 1994 WL 621977, *3 (N.D.Cal. Nov. 1, 1994); *Guerin v. American Telephone & Telegraph*, No. 93-1522, 1994 WL 245937, *4 (N.D.Cal. June 1, 1994) (same); *Turic v. Holland Hospitality, Inc.*, 849 F.Supp. 544, 552 (W.D.Mich.1994) (applying section in pretext case). *See Lam v. University of Hawaii*, 40 F.3d 1551, 1564-65 (9th Cir.1994); *Sheppard v. Riverview Nursing Centre, Inc.*, 870 F.Supp. 1369 (D.Md.1994); *Johnson v. El Paso Pathology Group, P.A.*, 868 F.Supp. 852, 862-63 (W.D.Tex.1994).

Our Circuit has left open whether the motivating factor instruction should be given in pretext cases. In *Hook v. Ernst & Young*, 28 F.3d 366, 368, 371 (3d Cir.1994), "motivating factor" was held not to apply retroactively to a pretext case. Also, in *Miller*, in holding that a "determinative effect" instruction was proper in a pretext case under the Age Discrimination in Employment Act, the Circuit explicitly did not decide whether § 2000e-2(m) affected the burden of proof for Title VII pretext cases. 47 F.3d at 598 n. 10. *See also Armbruster v. Unisys Corp.*, 32 F.3d 768, 771 (3d Cir.1994).

The legislative intention to overturn *Price Waterhouse v. Hopkins* is clear. *See* H.R.Rep. No. 102-40(I), 102nd Cong., 1st Sess. 45, 48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 586. However, the amendment does not limit itself to a *Price Waterhouse*-type of mixed motives case. The concern of both the plurality and the dissent in *Price-Waterhouse* was causation--the meaning of "because of" in the statutory scheme. In overturning that decision, Congress has unequivocally spelled out a simple, comprehensive definition. With the exception of disparate impact cases, it extends to all "unlawful employment practices." The salutary result is a uniform approach to all Title VII disparate treatment cases. (FN21)

Moreover, contrary to defendant's view, a "motivating factor" instruction does not shift the burden of proof. Plaintiff at all times has the burden of showing by a preponderance that defendant was motivated by a discriminatory purpose. *See* Feb. 15, 1995, Charge, N.T. 3. The necessary quantum of evidence is changed. Once it is produced, defendant has a partial "mixed motive" affirmative defense that in any event it would have taken the same employment action ***308** (FN22) 42 U.S.C. § 2000e-5(g)(2)(B); ABA Model Jury Instructions 1.01[2]. Just as in the ordinary tort or contract case, plaintiff's burden does not shift, despite defendant's opportunity to present an avoidance defense.

[6] Here, if it was error not to instruct on "determinative effect," it appears that the jury would nevertheless have reached the same conclusion. The jury specifically found not only that defendant was motivated by an unlawful consideration, but also that it acted "with malice or reckless indifference to [plaintiff's] rights." Jury verdict form. The quantitative or qualitative distinction between "motivating" and "determinative" would therefore seem to have been immaterial to the retaliation verdict.

B.

[7] As regards the significance of the presence of racist graffiti, the jury was instructed that:

There was evidence of race-biased graffiti in a bathroom at the Chester plant. An employer that permits such graffiti to exist may be held responsible for the racial bias conveyed by it if it condones the graffiti or acquiesces in it.

All of the facts and circumstances, including the employer's reaction, the steps, if any, taken by the employer to counteract the graffiti and what was reasonably required given the nature of the racial provocation, should be considered in deciding whether the employer's alleged lack of appropriate response bears on its racial attitude. In other words, it is direct evidence of the employer's intent to discriminate.

Feb. 15, 1995, charge, N.T. 8. Defendant objects that its response to the graffiti was not relevant to either the race or retaliation claim, (FN23) so that the characterization of it as "direct" evidence was prejudicial.

[8] Under Fed.R.Evid. 401, (FN24) relevancy is a broad standard. Evidence is not to be excluded "solely because its probative value is extremely low." (FN25) Weissenberger's Federal Evidence § 401.3. Here, one issue was whether

defendant acted with retaliatory animus in terminating plaintiff. (FN26) In an analogous case, our Court of Appeals, in agreement with the Eighth Circuit, has pointed out that "an atmosphere of condoned sexual harassment in a workplace increases the likelihood of retaliation for complaints in individual cases." *Glass v. Philadelphia*, 34 F.3d 188, 195 (3d Cir.1994) (citing *Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 155 (8th Cir.), *cert. denied*, 498 U.S. 854, 111 S.Ct. 150, 112 L.Ed.2d 116 (1990). *See also Josey v. John R. Hollingsworth*, 996 F.2d 632, 641 (3d Cir.1993) (discriminatory motive for firing of employee can be inferred from evidence that management permitted an atmosphere of racial prejudice to infect the workplace). (FN27)

***309.** Additionally, it is extremely doubtful that the term "direct" prejudicially affected the jury. *See Mooney v. Aramco*, 54 F.3d 1207, 1216 (5th Cir.1995) (instructions not prejudicial if outcome unaffected). The graffiti incident was a minor part of the trial. Moreover, the distinction between direct and circumstantial evidence is often "subtle and difficult." *Price Waterhouse v. Hopkins*, 490 U.S. at 291, 109 S.Ct. at 1812 (Kennedy, J., dissenting). In a general instruction on direct and circumstantial evidence, the jury was told that it could consider both kinds of evidence in reaching its verdict, Feb. 15, 1995, charge, N.T. 10-11.

The term "direct evidence" has both an evidentiary and an employment law sense. *Id.* Failure to respond appropriately or an acquiescence can be equated with approval, acceptance, or actual expression. And silence, where there is a duty to respond, has been said "to speak with the voice of thunder." As a matter of employment law, had the company's managers said the words that appear in the graffiti, that would have constituted direct evidence of racial animus. *See Armbruster v. Unisys Corp.*, 32 F.3d 768, 778 (3d Cir.1994) (direct evidence is evidence directly reflecting a discriminatory or retaliatory animus on the part of a person involved in the decisionmaking

process). In this way a condonation or acquiescence in the graffiti can be regarded as direct evidence of company animus--in contrast with evidence of pretext, which is circumstantial. It was for this reason that the instruction, using the term "direct evidence," was given. The jury had previously been instructed that the evidentiary effect of the pretext syllogism was "circumstantial." Feb. 15, 1995, charge, N.T. 6.

V.

[9] Defendant asks that the judgment representing loss of future earnings should be reduced to present worth pursuant to a pre-verdict stipulation. During the charge conference, counsel agreed, in lieu of a present worth instruction, to mold a future earnings verdict via a four percent annual discount rate over a five-year period. The stipulation was made of record. Feb. 14, 1995, N.T. 70. Citing *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), plaintiff now argues that no reduction is necessary under the PHRA. Without regard to the merits of such hindsight, counsel's pre-instructions agreement will be enforced. It is not desirable or feasible to go back to the point where counsel chose to agree on the applicable law and the case proceeded on that basis. Defendant's unopposed method of calculation will be employed, and the future earnings portion of the verdict will be reduced from $397,845 to $327,698.72.

VI.

[10] Plaintiff's motion for prejudgment interest on the backpay award will be granted. Defendant's objection is that counsel stipulated before trial to a total backpay award of $150,000. During closing arguments, plaintiff's counsel referred to the amount as "$150,000 worth of past losses," Feb. 15, 1995, N.T. 34, and defendant's counsel said these were losses "up to today." *Id.* at 66. Neither statement purports to include interest, and the stipulation itself does not exclude prejudgment interest, albeit defendant may not have expected such a claim.

Technically, plaintiff's position is correct. No objection having been made to the six percent interest rate or the method of calculation, prejudgment interest of $9,000 will be added to the verdict.

ORDER

AND NOW, this 4th day of August, 1995, defendant Scott Paper Company's renewed motion for judgment as a matter of law, to alter the judgment or, in the alternative, for a new trial, is granted in part and denied in part. Plaintiff James W. Woodson's motion for prejudgment interest of $9,000 is granted. The judgment as altered is $1,496,698.70.

FN1. By letter dated June 30, 1995, plaintiff's motion for reinstatement was withdrawn.

FN2. The same argument was made in defendant's summary judgment motion, memorandum, Jan. 9, 1995 at 2-3, and at trial. This issue was not waived, the answer to the complaint having denied administrative remedies exhaustion. Answer ¶ 6. This is not a case where the defense was first raised on appellate review. *E.g., Daugherity v. Traylor Bros. Inc.*, 970 F.2d 348, 351-52 (7th Cir.1992); *Nat'l Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 940 (D.C.Cir.1987).

FN3. It is unnecessary to decide whether the future earnings portion of the verdict would be subject to the cap.

FN4. His argument to the contrary, plaintiff's retaliation claim cannot be said to have "grown out" of his previously filed administrative charges inasmuch as PHRC's earlier investigation had been closed before he was terminated. *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir.1984) (test is whether additional charges "are reasonably within the scope of the complainants's original charges and if a reasonable investigation by the EEOC would have encompassed the new claims"). *See Snyder v. Pennsylvania Assoc. of School*

Retirees, 389 Pa.Super. 261, 273-74, 566 A.2d 1235, 1241 (1989) (retaliation claim filed with PHRC 19 months after age and sex discrimination claim required separate exhaustion). It is correct that his EEOC charges were still open, and these foreclosed his PHRC proceedings, *see infra* at 9 n. 11. However, preparatory to the present action, he filed new charges with the EEOC. *Id.*

*309_ FN5. At trial, defendant's counsel read into the record requests for admissions, including:

Second request for admission, James W. Woodson did not file a charge of discrimination with the Pennsylvania Human Relations Commission based on the acts alleged in EEOC charge number 170921474 and Mr. Woodson's EEOC charge number 170921474 was not cross-filed with the Pennsylvania Human Relations Commission. That request for admission was admitted.

Id.

Whether this means that plaintiff did not cross-file or that the charge was not sent by the EEOC, or, if sent, was not received or was mislaid by the PHRC has not been argued.

FN6. In support of its present motion, although not part of the trial record, defendant proffered a form purportedly signed by plaintiff dated July 22, 1992 entitled "Acknowledgement of Right to File a Complaint":

I hereby acknowledge that I have received a letter advising me of my right to file a complaint under the Pennsylvania Human Relations Act. I am aware that I must file with PHRC within 30 days, or else I will lose those rights to relief under state law safeguarded by filing under the Pennsylvania Human Relations Act. I understand that this form is not a formal complaint.

The EEOC letter informing plaintiff that his charge had been transmitted to the PHRC was dated one week later.

FN7. The Pennsylvania Supreme Court has stated, "A liberal construction for the accomplishment of the purposes of the act is not synonymous with a relaxation of the rule of exclusivity for the benefit of a complainant." *Fye v. Central Transportation Inc.*, 487 Pa. 137, 142, 409 A.2d 2, 5 (1979). Here, however, it seems that plaintiff specifically intended a filing with the PHRA.

FN8. The Worksharing Agreement for Fiscal Year 1994 was part of defendant's summary judgment motion, exh. O.

FN9. *Fye*, 487 Pa. at 142, 409 A.2d at 5, is distinguishable because no worksharing agreement was at issue.

FN10. Title VII standards generally apply to PHRA actions. *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 471 n. 14 (3d Cir.), *cert. denied*, 510 U.S. 865, 114 S.Ct. 186, 126 L.Ed.2d 145 (1993).

FN11. Defendant's supplemental exhibits show that plaintiff's PHRC charges were deferred to the EEOC and closed February 21, 1991. A00081. The EEOC charges remained pending. That some two years had passed from the date of filing to the date of termination does not preclude a finding of causation. *Robinson*, 982 F.2d at 894-95 ("The mere passage of time is not legally conclusive proof against retaliation"), *citing*, *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 43 (5th Cir.1992).

FN12. This memorandum was dated December 17, 1991, prior to the final decision to terminate plaintiff.

FN13. In a recommendation section, the memorandum states, "If EEOC sensitivity too high--reassign in Chester...."

FN14. This expression, which was brought out on cross-examination, appeared in an affidavit in support of defendant's summary judgment motion as an explanation for plaintiff's low rating.

FN15. Jury question four asked:

In unlawfully terminating plaintiff James W. Woodson, did defendant Scott Paper Company act with malice or with reckless indifference to his rights--for which conduct punitive damages are awarded?

____ Yes ____ No

If Yes, what is the amount of punitive damages?

FN16. The statute also provides, "It shall be an unlawful employment practice for an employer ... to discharge any individual ... because of such individual's race, color, religion, sex, or national origin.... 42 U.S.C. § 2000e-2(a)(1)."

FN17. Under Fed.R.Civ.P. 51, counsel must object to jury instructions by "stating distinctly the matter objected to *and the grounds of the objection."* (Emphasis added.) Defendant objected to a specific matter, but not on the grounds now asserted. *See Seman v. Coplay Cement Co.*, 26 F.3d 428, 437 n. 12 (3d Cir.1994) (failure to raise issue of whether "a" rather than "the" was correct article modifying "determinative factor" constituted waiver); *Abraham v. Pekarski*, 728 F.2d 167, 172 (1984) (failure to object to punitive damages instruction with regard to sufficiency of evidence constituted waiver), *cert. denied*, 467 U.S. 1242, 104 S.Ct. 3513, 82 L.Ed.2d 822; *Bogacki v. American Machine & Foundry Co.*, 417 F.2d 400, 406-07 (3d Cir.1969) ("[W]e wish the record to state that we object to the failure on the part of the Court to charge on warranties" did not comply with R. 51 because it did not specify

the kind of warranty relied upon); *Dostal, v. Baltimore & O.R. Co.*, 189 F.2d 352, 356 (3d Cir.1951) ("A mere statement that counsel objects ... with no indication as to the grounds for the objection does not satisfy either the letter or the spirit of R. 51"). Defendant does not assert fundamental error. *Bogacki*, 417 F.2d at 407.

*309_ FN18. Defendant, citing *Battaglio v. General Electric Co.*, No. 94-4675, 1995 WL 11980, *6 (E.D.Pa. Jan. 5, 1995), argues that the causal link element of the prima facie retaliation case entails a heightened burden of proof. In *Battaglio*, however, plaintiff's retaliation claim failed because there was no actual or constructive discharge. *Id.* Causation was immaterial.

FN19. Plaintiff's belated argument that there was sufficient evidence to merit a mixed motives instruction must be rejected.

FN20. Defendant has cited a number of cases that are not on point. *Maidenbaum v. Bally's Park Place, Inc.*, 870 F.Supp. 1254, 1261 n. 11 (D.N.J.1994) stated in dicta that the 1991 Act "did not change the 'direct evidence' requirement necessary to support a mixed motives case." However, *Maidenbaum* was an ADEA case, and that statute was not amended. *Doe*, 862 F.Supp. 1310 (E.D.Pa.1994) arose under the ADA, also not amended, and was not a pretext case. *Mickens v. Penn Mutual Ins. Co.*, No. 93-6875, 1994 WL 396396, **9-10 (E.D.Pa. July 29, 1994) implicitly endorsed a pretext/mixed motives distinction during a bench trial but then concluded, "Plaintiff has not met her burden of persuasion by a preponderance of the evidence that defendant's reasons are not to be believed or that defendants were more likely *motivated* by discriminatory reason for terminating the plaintiff" (emphasis added). *EEOC v. Horizons Hotel Corp.*, 831 F.Supp. 10, 12 n. 2, 15 n. 12 (D.P.R.1993) arose before the 1991 amendment.

FN21. This view comports with the concurring opinion of Judge Greenberg in *Miller*, 47 F.3d at 599 ("Thus unlike the en banc

majority, I would dispense altogether with the terms "pretext" and "mixed motives" and hold explicitly that the same standard applies to all disparate treatment cases").

FN22. Here, although discussed at the charge conference, no instruction on this defense was requested and there was no objection to its omission. Nor does defendant contend in this motion that the jury should have been so instructed. *See Hennessy*, 864 F.Supp. at 762 n. 2.

FN23. This instruction refers to defendant's "racial bias" and "racial attitude"--and not to retaliatory animus. Plaintiff, on that basis, argues that the reference to "direct evidence" could not have been prejudicial inasmuch as he did not prevail on the race discrimination claim. However, given the factual context, it is hard to separate the two completely.

FN24. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401.

FN25. It is not argued that the evidence should have been excluded for any other reason.

FN26. Plaintiff's supervisor, who wrote the "workshedding memorandum" for the forced ranking committee, *supra* at 9, was also directly involved in defendant's response to the graffiti incident. Feb. 10, 1995, N.T. 95-99.

FN27. In *Glass*, our Circuit stated:

The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the

fact-finder to disbelieve an employer's account of his own motives.

34 F.3d at 195 (citing *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir.1988)).

Supreme Court, U. S.
FILED
SEP 9 1997
CLERK

No. 97-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JAMES W. WOODSON,

Petitioner,

v.

SCOTT PAPER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN R. WALL*
IAN M. BALLARD, JR.
MORGAN, LEWIS & BOCKIUS LLP
2000 One Logan Square
Philadelphia, PA 19103
Telephone: (215) 963-4928/5080

Counsel for Respondent

*Counsel of Record

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the Third Circuit Court of Appeals correctly conclude that Section 107(a) of the Civil Rights Act of 1991, requiring a plaintiff to establish that status-based discrimination was merely "a motivating factor" in the adverse employment action, does not apply to Title VII retaliation claims, where the text of Section 107(a) excludes any reference to retaliation claims and its legislative history indicates that it was intended only to apply to status-based discrimination claims?

2. Did the Third Circuit Court of Appeals correctly conclude that the harmless error formulation first articulated by this Court in a criminal case, *Kotteakos v. United States,* 328 U.S. 750 (1946), applies in civil cases, where the statute and the rules governing appellate review make no distinction between civil and criminal cases?

RULE 29.6 STATEMENT

In 1996, Respondent Scott Paper Company merged with a wholly-owned subsidiary of Kimberly Clark Corporation, a publicly traded company. Scott Paper Company then changed its name to Kimberly Clark Tissue Company, and continues to operate as a wholly-owned subsidiary of Kimberly Clark Corporation. The new entity, Kimberly Clark Tissue Company, has no publicly traded subsidiaries or other parents.

TABLE OF CONTENTS

Page

COUNTER STATEMENT OF QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

COUNTER STATEMENT OF THE CASE 2

SUMMARY OF REASONS FOR DENYING THE PETITION 5

REASONS FOR DENYING THE PETITION 6

I. This Court Should Deny The Petition For Writ Of Certiorari On The Issue Of Whether Section 107(a) Of The Civil Rights Act Of 1991 Applies To Retaliation Claims 6

A. There Is No Split Of Authority Among The Courts Of Appeals On This Issue 6

B. The Third Circuit Court Of Appeals Correctly Held That Section 107(a) Does Not Apply To Retaliation Claims 8

II. This Court Should Deny The Petition For Writ Of Certiorari On The Issue Of Whether The Third Circuit Used The Proper Harmless Error Standard 11

A. Marginally Different Formulations Of The Harmless Error Standard Are Not "An Important Question Of Federal Law" Warranting Supreme Court Review 11

B. The Third Circuit Court Of Appeals Correctly Remanded For A New Trial, Regardless Of The Semantic Standard Used 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aetna Cas. & Sur. Co. v. Gosdin, 803 F.2d 1153 (CA11 1986) 11

Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927 (CA5 1976) 11

Doe v. Kohn, Nast & Graf, 862 F. Supp. 1310 (E.D. Pa. 1994) 8

Haddad v. Lockheed Cal. Corp., 720 F.2d 1454 (CA9 1983) 12

Hall v. City of Brawley, 887 F. Supp. 1333 (S.D. Cal. 1995) 8

Heywood v. Samaritan Health Sys., 902 F. Supp. 1076 (D. Ariz. 1995) 8

Kotteakos v. United States, 328 U.S. 750 (1946)..... 11-14

Lewis v. American Foreign Serv. Line Ass'n, 846 F. Supp. 71 (D.D.C. 1993) 8

McIlroy v. Dittmer, 732 F.2d 98 (CA8 1984)..... 12

McQueeney v. Wilmington Trust Co., 779 F.2d 916 (CA3 1985)..... 11-12, 14

Paape v. Wall Data Inc., 934 F. Supp. 969 (N.D. Ill. 1996) 8

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 7

Smith v. Chesapeake & Ohio Ry., 778 F.2d 384 (CA7 1985)..... 11-12

Tanca v. Nordberg, 98 F.3d 680 (CA1 1996), *cert. denied*, 117 S. Ct. 1253 (1997) 6-7, 9

United States Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223 (CA10 1988) 12

Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881 (CA7 1996) . 7-8

Woodson v. Scott Paper Co., 109 F.3d 913 (CA3 1997) ..... *passim*

TABLE OF AUTHORITIES—*(Continued)*

Page

UNPUBLISHED CASES

Beinlich v. Curry Dev., Inc., No. 94-1465, 1995 WL 311577 (CA4 May 22, 1995) 7

OTHER AUTHORITIES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2111 13

42 U.S.C. § 1981a(a)(1) 9

42 U.S.C. § 2000e *et seq.* 2

42 U.S.C. § 2000e-2(m) 6, 9

42 U.S.C. § 2000e-3 ..... *passim*

42 U.S.C. § 2000e-5(g)(2)(A) 9

Pa. Stat. Ann. tit. 43, § 951 *et seq.* 2

Fed. R. Civ. P. 50 4

Fed. R. Civ. P. 59 4

Fed. R. Civ. P. 61 13

Fed. R. Crim. P. 52(a) 13

H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 10

H.R. Rep. No. 102-40(II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 694 10

12 James Wm. Moore et al., Moore's Federal Practice § 61.02[3] (3d ed. 1997) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-266

JAMES W. WOODSON,

Petitioner,

v.

SCOTT PAPER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Scott Paper Company ("Scott" or the "Company") respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on April 3, 1997.

OPINIONS BELOW

The opinion of the court of appeals is reported at 109 F.3d 913 (CA3 1997). The opinion of the district court is reported at 898 F. Supp. 298 (E.D. Pa. 1995).

JURISDICTION

The court of appeals entered its judgment on April 3, 1997. The order of the court of appeals denying rehearing was entered on May 6, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

COUNTER STATEMENT OF THE CASE

In January 1992, Petitioner James Woodson was discharged from his position with Respondent Scott Paper Company ("Scott" or the "Company") as a result of a company-wide reduction in force. More than 250 other Scott employees lost their jobs in connection with the reduction in force. In a Complaint filed November 11, 1993, Petitioner alleged that the decision to discharge him was made because of his race and in retaliation for filing discrimination complaints in 1989 and 1990, two years prior to his discharge, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended ("Title VII"), and the Pennsylvania Human Relations Act ("PHRA"), Pa. Stat. Ann. tit. 43, § 951 *et seq.*

Petitioner began working for Scott in 1970 and was transferred to the Company's Chester, Pennsylvania plant in 1983 in a Technical Manager position. After enjoying two promotions in five years, Petitioner performed poorly in an interview process in 1988 for a further promotion to a Product System Leader position. His failure to obtain that promotion, as well as promotion to two General Manager and one other Product System Leader positions which thereafter opened, led him to file two discrimination complaints with the Pennsylvania Human Relations Commission ("PHRC"). Little to no activity took place on those complaints, and they remained pending, albeit dormant, at the time of Petitioner's discharge.

In October 1990, eight months after he filed his second PHRC complaint, Petitioner was promoted by his direct supervisor, James Peiffer, the Chester Plant Manager, to the "Napkins" Product System Leader position in the Chester plant after Petitioner successfully completed a competitive "situational interview" process. Both Mr. Peiffer and Petitioner testified that Petitioner was selected for the difficult

Napkins job because of his background with napkin finishing, and because Petitioner was, in Peiffer's view, "probably the only person at Scott Paper who could turn napkins around." Between February 1990, when Woodson filed his second PHRC complaint, and January 1992, when Woodson was discharged, he received the Napkins promotion, numerous salary increases (including a $6000 lump sum increase with his promotion), stock options, and special achievement awards.

In 1991, the Chester plant employed approximately 1,800 salaried and hourly employees. In June or July of that year, while serving as weekend manager on call, Woodson observed anonymous racial graffiti spray-painted on the wall of one of the men's bathrooms in the Chester plant. The bathroom was not near Woodson's Napkins product system and the graffiti did not mention Woodson's name.[1]

Contrary to the claims in the instant petition that Scott "took no reasonably adequate action" to respond to the graffiti, Scott in fact hired a private investigator to perform a complete investigation of the incident. Scott also commissioned a joint management and union task team at the Chester plant to address issues raised by the graffiti, and published immediately a notice condemning the graffiti. The task team sent out questionnaires to all employees in August or September of 1991 and instituted a training program regarding EEO issues in the second quarter of 1992.

In November 1991, Scott implemented a company-wide "Cost Reduction Program," which required for the first time the forced rating and ranking of all salaried employees across designated work groups. Of the twenty-seven employees within the Product System Leader work group, Petitioner was rated and ranked twenty-fifth. The bottom five individuals, including Petitioner, were selected for discharge. Of the sixteen executive, plant, and staff-level managers selected for dis-

1. Petitioner incorrectly contends that the graffiti must have been directed at him because he was the "only new black management employee" at the Chester plant at the time. Petitioner was not a "new" manager, having been in a managerial position at that plant since 1983, and was not the only black manager at the Chester plant.

charge throughout the manufacturing business, fourteen were white, and two (including Petitioner) were black.

Petitioner's claims were tried before a jury in the United States District Court for the Eastern District of Pennsylvania from February 7-15, 1995. Over Scott's objection, the district court instructed the jury to find for Woodson if he proved *merely* "that race or retaliation was a motivating factor, a factor that played a role in the employment decision to terminate him," and refused to instruct that Woodson's burden included proving that his race or retaliation had "a determinative effect" on his discharge. The district court also improperly instructed the jury that evidence of race-biased graffiti could be used as *direct evidence* of Scott's intent to discriminate. Scott specifically objected to the district court's "a motivating factor" and "graffiti" instructions. The district court chose not to amend its instructions.

The jury returned a verdict through a special verdict form in favor of Petitioner on the retaliation claim, and in favor of Scott on the race discrimination claim. Scott timely filed and served its Post-Trial Motion under Federal Rules of Civil Procedure 50 and 59, and reasserted each of the arguments raised in its Motion for Judgment as a Matter of Law presented at the close of the evidence. In addition, Scott's Post-Trial Motion sought a new trial in light of erroneous and prejudicial jury instructions given by the district court on the retaliation claim. On August 7, 1995, the district court denied in substantial part Scott's motion, and entered judgment against Scott in the amount of $1,496,698.70.

Scott timely appealed this decision to the Third Circuit Court of Appeals, which in turn rendered its decision on April 3, 1997. While agreeing that Scott was not entitled to judgment as a matter of law on the retaliation claim, the Third Circuit Court of Appeals remanded for a new trial on this claim because of the two serious errors in the jury instructions identified by Scott, namely: (1) the improper use of the "a motivating factor" causation language of Section 107(a) of the Civil Rights Act of 1991 for the retaliation claim; and (2) the

improper instruction permitting the jury to use the graffiti incident as "direct evidence" of discriminatory animus.[2]

Petitioner's Petition for Rehearing and his Suggestion for Rehearing *En Banc* were denied by the Third Circuit Court of Appeals on May 6, 1997.

SUMMARY OF REASONS FOR DENYING THE PETITION

The granting of a writ of certiorari in this case is not warranted. The Third Circuit Court of Appeals properly held, as had the First Circuit Court of Appeals in an earlier decision, that the causation standard set forth in Section 107(a) of the Civil Rights Act does not apply to Title VII retaliation claims. Retaliation claims are explicitly governed by a separate provision of Title VII and are not referenced in any manner in Section 107(a). Moreover, the legislative history of Section 107(a) makes clear that the amendment was only intended to address status-based discrimination claims. The Third Circuit Court of Appeals' reasoning is sound, and contrary to Petitioner's assertions, there is no split among the courts of appeals on this issue that requires resolution by this Court.

The Third Circuit Court of Appeals also properly concluded that two serious jury instruction errors were not harmless and warranted remand for a new trial on Petitioner's retaliation claim. Petitioner claims that the harmless error standard used by the court of appeals, based on this Court's formulation in a criminal case, is improper in a civil case and is in conflict with other courts of appeals. The use of slightly different gradations of the harmless error standard does not create the kind of serious conflict among the courts of appeals or raise an important question of federal law that would warrant this Court's intervention. Moreover, the Third Circuit Court of Appeals' use of the same harmless error formulation for civil and criminal cases comports with the uniform standards of appellate review articulated in the applicable statute

2. The court of appeals also reversed and directed the district court to enter judgment in Scott's favor on the PHRA claim. This portion of the decision is not raised by Petitioner in the instant petition.

and rules. Finally, no review is necessary because the two errors identified by the appeals court were serious enough to require reversal and remand under any harmless error formulation.

REASONS FOR DENYING THE PETITION

I. This Court Should Deny The Petition For Writ Of Certiorari On The Issue Of Whether Section 107(a) Of The Civil Rights Act Of 1991 Applies To Retaliation Claims.

In its decision below, the Third Circuit Court of Appeals, following the First Circuit Court of Appeals, held that the causation standard set forth in Section 107(a) of the Civil Rights Act of 1991 did not apply to Title VII retaliation claims.[3] Contrary to Petitioner's contentions, there is no split of authority among the courts of appeals on this issue that would warrant this Court's review. Moreover, the plain language of the amendment, combined with its legislative history, leaves no doubt that the position of the Third and First Circuit Courts of Appeals is correct.

A. There Is No Split Of Authority Among The Courts Of Appeals On This Issue.

Petitioner represents to this Court that there is a "clear split in the decisional law of the circuits" on the applicability of Section 107(a) to retaliation claims. Br. of Pet'r at 13. This is simply not an accurate statement. The only two courts of appeals to analyze meaningfully this issue are the First Circuit, in *Tanca v. Nordberg,* 98 F.3d 680 (CA1 1996), *cert. denied,* 117 S. Ct. 1253 (1997), and the Third Circuit in the instant

3. As discussed more fully below, Section 107(a) of the 1991 Civil Rights Act, codified at 42 U.S.C. § 2000e-2(m), provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added). Title VII contains a separate section prohibiting retaliation against, *inter alia,* persons who oppose discriminatory employment practices. 42 U.S.C. § 2000e-3.

case, *Woodson v. Scott Paper Co.*, 109 F.3d 913 (CA3 1997). Both of these courts concluded, after lengthy analysis, that Section 107(a) did not apply to Title VII retaliation claims. *Tanca*, 98 F.3d at 684; *Woodson*, 109 F.3d at 934. Accordingly, there is no "real and embarrassing conflict of opinion and authority" among the courts of appeals that would warrant review by this Court. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955) (citation omitted).

Petitioner bases his purported "clear conflict" on the decision of the Fourth Circuit Court of Appeals in *Beinlich v. Curry Development, Inc.*, No. 94-1465, 1995 WL 311577 (CA4 May 22, 1995), and the decision of the Seventh Circuit Court of Appeals in *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881 (CA7 1996). Neither case supports his contention. First, *Beinlich's* precedential value is severely limited by the fact that it is an unpublished disposition. Fourth Circuit Local Rule 36(c), cited prominently at the top of the *Beinlich* decision, disfavors the use of unpublished dispositions except to establish res judicata, estoppel, or law of the case. Even if *Beinlich* were properly cited for present purposes, the decision itself does not adopt clearly Section 107(a)'s "a motivating factor" language for retaliation claims and provides absolutely no discussion of the issue. The decision simply cites *both* Section 107(a) and Title VII's retaliation section, 42 U.S.C. § 2000e-3(a), but fails to explain which causation standard it is applying. *Beinlich*, 1995 WL 311577, at *3. Accordingly, *Beinlich* hardly places the Fourth Circuit in "clear conflict" with the First and Third Circuits.

The same can be said about the Seventh Circuit Court of Appeals' decision in *Veprinsky*. Unlike the instant case, *Veprinsky* involved direct evidence that a retaliatory motive influenced the adverse employment action. 87 F.3d at 893. Therefore, there was no dispute that an improper motive was at least "a motivating factor" in the decision. Accordingly, the focus of the decision was whether the employer would have made the same decision absent the retaliatory motive. As a result, the court made only two passing references to Section 107(a), with no discussion as to its application to retaliation claims. *Id.* at 893-94. *Veprinsky* simply does not put the Sev-

enth Circuit in "clear conflict" with the First and Third Circuits, especially with respect to a pretext retaliation claim such as that presented in the instant case.

The only decision to come to a clearly contrary conclusion than the First and Third Circuits on this issue is *Heywood v. Samaritan Health System*, 902 F. Supp. 1076 (D. Ariz. 1995). In that case, the district court first conceded that neither the specific language of Section 107(a), nor the House Report addressing it, includes any reference to retaliation, and that retaliatory discharge is specifically addressed in Section 704(a), 42 U.S.C. § 2000e-3. *Id.* at 1081. Nonetheless, the *Heywood* court, relying on its own assumptions about the "policy articulated in the amendment and in the House Reports," concluded that Section 107(a) applied to retaliation claims. *Id.* Clearly, the *Heywood* decision, based on dubious reasoning itself, does not portend a looming conflict in the courts of appeals on this issue.[4]

In sum, contrary to Petitioner's assertions, there is no clear split in the decisional law among the courts of appeals on the applicability of Section 107(a) to employment retaliation claims. Accordingly, this Court's intervention is not required, and the petition for writ of certiorari should be denied.

B. The Third Circuit Court Of Appeals Correctly Held That Section 107(a) Does Not Apply To Retaliation Claims.

In the decision below, the Third Circuit Court of Appeals correctly concluded that Section 107(a) "on its face does not apply to retaliation claims." *See Woodson*, 109 F.3d at 933; *see*

---

4. Nor do the other district court decisions cited by Petitioner make this issue ripe for this Court's review. *See Hall v. City of Brawley*, 887 F. Supp. 1333, 1345 (S.D. Cal. 1995) (applying without discussion the mixed motives analysis of Section 107(a) to retaliation claim); *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310, 1316 (E.D. Pa. 1994) (summarily applying Section 107(a) to retaliation claim brought under the Americans with Disabilities Act); *Lewis v. American Foreign Serv. Line Ass'n*, 846 F. Supp. 71 (D.D.C. 1993) (retaliation claim arising under 42 U.S.C. § 1981); *Paape v. Wall Data Inc.*, 934 F. Supp. 969 (N.D. Ill. 1996) (no retaliation claim asserted).

also Tanca, 98 F.3d at 682 (citing the district court's conclusion that "nothing in the 1991 Act would appear to change any rule with respect to retaliation claims which existed prior to its enactment"). Indeed, Section 107(a) refers exclusively to status-based discrimination claims:

> **(m) Impermissible consideration of race, color, religion, sex or national origin in employment practices**
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that *race, color, religion, sex, or national origin was a motivating factor* for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (emphasis added). The statute does not include "retaliation" among its list of factors that can constitute an unlawful employment practice. Instead, retaliation claims are defined under an entirely separate section of Title VII, at 42 U.S.C. § 2000e-3(a), and there is no reference to this provision in Section 107(a).

The Third Circuit Court of Appeals also found support for its conclusion in the fact that Congress has specifically incorporated the retaliation provision into other sections of Title VII, thereby suggesting that its failure to do so in Section 107(a) was intentional. *Woodson,* 109 F.3d at 934; 42 U.S.C. § 1981a(a)(1) (added by Section 102 of the 1991 Act, and providing for compensatory and punitive damages in Title VII "sole cause" discrimination *and* retaliation claims) and 42 U.S.C. § 2000e-5(g)(2)(A) (added by 1964 Civil Rights Act and limiting the availability of reinstatement and back pay in Title VII discrimination *and* retaliation claims).

Although resort to the legislative history is not necessary in light of Section 107(a)'s plain language, such a review does not lead to a contrary result. In fact, the relevant congressional committee reports show that in enacting Section 107(a) Congress was only concerned that "[t]he effectiveness of Title VII's ban on *discrimination on the basis of race, color, religion, sex or national origin* has been severely undercut by the recent

Supreme Court decision in *Price Waterhouse v. Hopkins.*" H.R. Rep. No. 102-40(I) ("H.R. Rep. I"), at 45 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583 (citation and footnote omitted) (emphasis added). The committee report also shows that Congress analyzed the *Price Waterhouse* decision thoroughly and concluded that "[l]egislation is needed to restore Title VII's comprehensive *ban on all impermissible consideration of race, color, religion, sex or national origin in employment.*" H.R. Rep. I, *reprinted in* 1991 U.S.C.C.A.N. at 585-86 (emphasis added and in original). Moreover, in H.R. Rep. No. 102-40(II), at 16-19 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 709-10, Congress expressly titled the report: "Clarifying Prohibition Against *Impermissible Consideration of Race, Color, Religion, Sex or National Origin* in Employment Practices." H.R. Rep. No. 102-40(II), at 16, *reprinted in* 1991 U.S.C.C.A.N. at 709 (emphasis added). The title does not refer to retaliation claims. In short, the legislative history makes clear that Section 107(a) was amended only to respond to *Price Waterhouse,* and there is no suggestion that it was intended to set a new causation standard for retaliation claims.

Petitioner also contends that the Third Circuit Court of Appeals' decision runs counter to the principle of uniformity in interpreting the various federal anti-discrimination statutes. Although it is generally true that the same standards of proof have been applied to the various statutes, such a principle does not require that the same standard of proof be applied to different sections of the same statute. Congress has delineated clearly status-based discrimination claims from retaliation claims, and there is no reason to treat them identically. While a good argument can be made to treat a Title VII retaliation claim identically to a retaliation claim under the Age Discrimination in Employment Act, the argument does not compel identical treatment of clearly distinct claims within each statute.

In sum, the Third Circuit Court of Appeals correctly held that Section 107(a) does not apply to retaliation claims. Accordingly, the petition for writ of certiorari on this issue should be denied.

II. This Court Should Deny The Petition For Writ Of Certiorari On The Issue Of Whether The Third Circuit Used The Proper Harmless Error Standard.

Petitioner contends that the Third Circuit Court of Appeals applied an incorrect harmless error standard in concluding that the two errors it found in the jury instructions warranted remand for a new trial. This Court should deny the petition for writ of certiorari based on these grounds for two independent reasons: (1) the use of slightly different formulations of the harmless error standard by the courts of appeals does not raise an "important question of federal law"; and (2) the Third Circuit Court of Appeals correctly remanded for a new trial because of the two pivotal jury instruction errors.

A. Marginally Different Formulations Of The Harmless Error Standard Are Not "An Important Question Of Federal Law" Warranting Supreme Court Review.

Petitioner seeks review of the Third Circuit Court of Appeals' decision because its formulation of the harmless error standard varies slightly from that employed by other courts of appeals. Simply put, this is not the type of important national issue that merits Supreme Court review.

The slightly different formulations of the harmless error standard employed by the courts of appeals generally can be grouped into two categories. One formulation relies on this Court's decision in *Kotteakos v. United States,* 328 U.S. 750, 776 (1946), a criminal conspiracy case, and treats an error as "harmless" only if the court finds that there is a "high probability" that the error did not contribute to the judgment. *McQueeney v. Wilmington Trust Co.,* 779 F.2d 916, 927 (CA3 1985) (adopting "high probability" standard); *Conway v. Chemical Leaman Tank Lines, Inc.,* 525 F.2d 927, 930 (CA5 1976) (adopting "fair assurance" standard); *Aetna Cas. & Sur. Co. v. Gosdin,* 803 F.2d 1153, 1159 (CA11 1986) (same).

The second variation on this approach treats the error as harmless only if the court believes that it is "more probable than not" that the error did not contribute to the judgment. *Smith v. Chesapeake & Ohio Ry.,* 778 F.2d 384, 389 (CA7

1985) (applying a standard of whether the error "affected a party's right to a fair trial to a substantial degree"); *McIlroy v. Dittmer,* 732 F.2d 98, 105 (CA8 1984) (adopting "more probably than not" standard); *Haddad v. Lockheed Cal. Corp.,* 720 F.2d 1454, 1459 (CA9 1983) (adopting standard that jury's verdict "more probably than not" untainted by the error); *United States Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1252-53 (CA10 1988) (adopting "more probably than not" standard).

Although Petitioner attempts to characterize these variations as diametrically opposed approaches to harmless error, in point of fact they are mere "shades of grey" causing no great rift among the courts of appeals. Petitioner attempts to create this fissure by referring to the Third Circuit Court of Appeals' approach as the "criminal law harmless error standard," thereby linking it, at least implicitly, to the "beyond a reasonable doubt" burden of proof applicable at criminal trials. In *McQueeney,* however, the Third Circuit Court of Appeals specifically considered and rejected a more stringent harmless error approach akin to the "beyond a reasonable doubt" criminal burden of proof. 779 F.2d at 924. Instead, it settled on the intermediate "highly probable" standard, an approach only marginally more stringent than the "more probable than not" standard. *Id.* at 927.

The insignificance of this issue is reflected also in the lack of discussion it has generated among the courts of appeals. In fact, the issue has not been raised among the courts of appeals for nearly ten years, when the Tenth Circuit Court of Appeals made a passing reference to the variance in a footnote. *See United States Indus.,* 854 F.2d at 1252 n.39.

Moreover, there is no indication that slightly different articulations of the harmless error standard have led to injustice or confusion. Courts of appeals are simply performing their proper role of identifying error and then making a reasoned judgment as to whether the error is serious enough to subject the parties and the judicial system to the costs associated with reversal and remand. As this Court noted in *Kotteakos,* such review is not an easy task, and "[b]y its very nature no standard of perfection can be attained." 328 U.S. at 761.

Respondent respectfully suggests that the courts of appeals are appropriately performing their review function, regardless of the specific harmless error language invoked, and no intervention by this Court is necessary.

B. The Third Circuit Court Of Appeals Correctly Remanded For A New Trial, Regardless Of The Semantic Standard Used.

The Third Circuit Court of Appeals properly identified two serious errors in the jury instructions and concluded that it could not say, with high probability, that these errors did not affect the outcome of the case. Accordingly, it reversed and remanded for a new trial on the retaliation claim. Although this articulation of the harmless error standard was proper, these two errors were serious enough to require reversal and remand under any harmless error formulation.

First, it is apparent that the Third Circuit Court of Appeals' approach to harmless error, derived from this Court's decision in *Kotteakos,* is wholly proper in both civil and criminal cases. The statutory provision governing the standards of appellate review make no distinction between criminal and civil cases: "On the hearing of *any* appeal or writ of certiorari in *any* case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (emphasis added). Indeed, Justice Rutledge in *Kotteakos* specifically noted that the predecessor to Section 2111 made no distinction between civil and criminal cases. 328 U.S. at 757 n.9; *see also* 12 James Wm. Moore et al., Moore's Federal Practice § 61.02[3] (3d ed. 1997) (concluding that *Kotteakos* established the framework for *both* criminal and civil cases).

Moreover, Federal Rule of Civil Procedure 61 defines harmless error as that which "appears to the court inconsistent with substantial justice," while its criminal analogue, Federal Rule of Criminal Procedure 52(a) defines harmless error as those errors "affect[ing] substantial rights." Given this uniform treatment of harmless error in the statute and the rules, there is no basis to abandon the standard set forth in *Kottea-*

kos and make it more difficult to correct trial court errors in civil actions. Indeed, these concerns about institutional integrity were specifically addressed by the Third Circuit Court of Appeals in *McQueeney* when it adopted the *Kotteakos* standard for civil cases. *See McQueeney,* 779 F.2d at 927 ("By maintaining a moderately stringent, though not unreasonably high, standard in civil as well as criminal cases, we preserve a strong incentive for the district courts to minimize their errors, and we thereby bolster the integrity of the federal judicial process").

Even if this approach to harmless error is incorrect, it is immaterial for the instant petition because, under any harmless error formulation, the two jury instruction errors were serious enough to warrant reversal and remand. The first instruction with which the court found error read as follows:

> There was evidence of race-biased graffiti in a bathroom at the Chester plant. An employer that permits such graffiti to exist may be held responsible for the racial bias conveyed by it if it condones the graffiti or acquiesces in it. All of the facts and circumstances, including the employer's reaction, the steps, if any, taken by the employer to counteract the graffiti and what was reasonably required given the nature of the racial provocation, should be considered in deciding whether the employer's alleged lack of appropriate response bears on its racial attitude. In other words, *it is direct evidence of the employer's intent to discriminate.*

Woodson, 109 F.3d at 929 (emphasis added). The court of appeals found that this instruction, particularly its concluding sentence, might have suggested to the jury that the graffiti itself could constitute *direct evidence* of retaliatory intent, which, of course, would be a legally impermissible conclusion. *Id.* at 930. The court of appeals also found that the instruction could permit a juror to conclude impermissibly that Scott's response to the graffiti, if found to be inadequate, could constitute direct evidence of retaliatory intent. *Id.* At most, a finding of an inadequate response to the graffiti would constitute only circumstantial evidence of discriminatory animus. *Id.*

Moreover, the court of appeals noted that the graffiti evidence was the only specific piece of evidence that the district court mentioned in the charge, which may have led the jury to give it too much weight.

This erroneous jury instruction was not harmless under any formulation of the harmless error standard. The instruction, in effect, gave the jury permission to treat the mere appearance of bathroom graffiti as *direct* evidence that the Company was motivated by discriminatory animus. This is a very serious error, and even under the less stringent harmless error formulation, no court could conclude that the error "more probably than not" did not contribute to the judgment against Respondent.

The Third Circuit Court of Appeals also concluded that the jury was improperly instructed that it could hold Respondent liable for retaliation if it found that Petitioner's filing of complaints with the EEOC and the corresponding state agency was a "motivating factor" in the decision to discharge him. *Woodson*, 109 F.3d at 931. As discussed above, liability under Title VII for retaliation requires a plaintiff to show not only that retaliatory animus was a motivating factor, but also that it had a *determinative effect* on the adverse employment action. *Id.* at 932. The court of appeals concluded that this error, which went to the pivotal issue of causation on the retaliation claim, was not harmless. *Id.* at 935.

The court of appeals' evaluation of the error's effect was correct under any harmless error formulation. The district court's instruction dramatically lowered Petitioner's burden by removing his obligation to establish that retaliatory animus had a determinative effect on his discharge. Especially when linked to the erroneous graffiti instruction permitting the jury to treat that incident as direct evidence of retaliatory intent, it is possible that the jury found *some* retaliatory animus behind the discharge decision. Under the law, however, this is not sufficient to establish liability. The jury instruction misstated this crucial causation standard, and no court could conclude that such a serious error was harmless.

CONCLUSION

For the foregoing reasons, Respondent Scott Paper Company respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

STEVEN R. WALL*
IAN M. BALLARD, JR.
MORGAN, LEWIS & BOCKIUS LLP
2000 One Logan Square
Philadelphia, PA 19103
Telephone: (215) 963-4928/5080

Counsel for Respondent

*Counsel of Record

Dated: September 9, 1997